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IN THE

Supreme Court of the United States

October Term, 1962

No. 804

ELLIOTT KAHANER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

WILLIAM W. KLEINMAN and
EUGENE GOLD,
Attorneys for Petitioner,
66 Court Street,
Brooklyn 1, New York.

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PETITION FOR CERTIORARI

Petitioner, Elliott Kahaner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on April 25, 1963, rehearing denied May 27, 1963.

Opinions Below

The two opinions of the United States Court of Appeals for the Second Circuit, respectively affirming the judgment of conviction (*infra*) here sought to be reviewed, and denying a rehearing, are reported in 317 F. 2d 459 and are printed in the Appendix hereto, *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered April 25, 1963 (Appendix B hereto, *infra*). A petition for rehearing, filed May 10, 1963, was denied by the Court of Appeals on May 27, 1963. By order of June 18, 1963, the Honorable Mr. Justice Harlan of this Court extended the time within which

petitioner Kahaner may file a petition for certiorari in this Court to and including July 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Where a high-ranking federal law enforcement officer (Kahaner), and an eminent judge of the Supreme Court of the State of New York (Keogh), have been convicted of conspiracy to obstruct Federal justice by taking a bribe of $35,000 to influence the disposition of a bankruptcy-fraud criminal case of extreme heinousness; and where the matter has (naturally) evoked nationwide concern and interest probably matched in American history only by the notorious *Manton* case; and where it is not seriously disputable that substantial questions, both factual and legal, exist as to the justness and lawfulness of the judgment of conviction,—should this Court exercise its certiorari jurisdiction on the ground of the sheer public importance of the case in relation to the indicatedly reviewable prejudicial errors, and in the interest of the wholesome administration of federal criminal justice, so that the cloud which rests upon the integrity of federal law enforcement by reason of the alleged conduct of the convicted defendants may not be suffered to remain as a national blemish without an affirmative declaration of the unavoidability thereof by the highest Court of the land?

2. Do the extraordinary circumstances of this case, as depicted in question No. 1 above and in subsequent questions herein, render this case appropriate for certiorari as an avenue for consideration by this Court of the overall degradation of the standards of fair trial that has come about in recent decades in federal criminal prosecutions through the combined degrading effects of the conspiracy-indictment device, the rule of admissibility of uncorrobo-

rated accomplice testimony, and the dilution of the rules of reasonable doubt and presumption of innocence—especially when the degrading impact of these processes occurs also in a trial setting where there is manifest reluctance, and even a declared inability, on the part of the jury to reach a verdict, and where such jury reluctance and inability are overborne by reading to the jury not once but twice the "dynamite" "Allen charge"?

3. Was petitioner denied a fair trial by the omissions from the charge to the jury of any instruction whatsoever as to the principal theory of the defense, which was supported by evidence; by the omission from the charge of several other items of fact importantly affecting key features in the structure of the defense; and by misstatements or inadequate statements of the evidence as to points which tended to strengthen the defense? Was the charge to the jury prejudicially weighted in favor of presenting the advantageous aspects of the Government's case and glossing over or omitting altogether the advantageous aspects of the defense case?

4. Is the judgment of conviction fatally defective by reason of the denial to the defendant-petitioner of Jencks Act statements to which he was entitled?

5. Was petitioner denied the right to trial by a fair and impartial jury, and was he denied his right of due process of law, by the rendering of the "Allen charge" twice after the jury reported that they were deadlocked?

6. Was petitioner denied a fair trial by the Trial Court's sanctioning of an improper and prejudicial cross-examination of petitioner with respect to an aspect of his personal finances which had no relevancy whatsoever to the trial issues (and which involved no improprieties on his part)?

7. Should the method of judicially administering the rule of reasonable doubt in federal criminal prosecutions be expressly re-enunciated by this Court along the lines of the concurring opinion of Circuit Judge Jerome Frank in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2 1956); and was petitioner denied a fair trial in that the jury which convicted him was not instructed in accordance with Judge Frank's concept of administering the rule of reasonable doubt?

8. Was there sufficient evidence of petitioner's guilt for submission to the jury under the rule of reasonable doubt as properly administered, construed and applied? Was his guilt proved in accordance with such rule? And was his conviction in accordance with such rule?

9. Petitioner Kahaner respectfully adopts, insofar as applicable to his case, the questions presented in the companion petitions for certiorari on behalf of petitioners Corallo and Keogh.

Constitutional and Statutory Provisions Involved

The case involves the Fifth Amendment (due process) and the Sixth Amendment (fair and impartial jury) of the Federal Constitution. It also involves 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 1503 (obstruction of justice), and Rule 52(b), F. R. Cr. P. (plain error). These provisions are printed in Appendix D hereto, *infra*. The case also involves the "Jencks Act" (18 U.S.C. § 3500) (not printed herein).

Statement of the Case

1. Introductory

By the judgment of the United States Court of Appeals for the Second Circuit here sought to be reviewed (Appendix B hereto, *infra*), that Court affirmed a judgment

rendered by the United States District Court for the Southern District of New York (430a),* after a jury verdict, convicting the petitioner and two other persons (Antonio Corallo and James Vincent Keogh) under a single count indictment (13a), charging conspiracy to influence, obstruct or impede the due administration of justice or to endeavor to do so, in violation of 18 U.S.C. § 1503. Each of the aforementioned three convicted defendants was sentenced to two years imprisonment (10a-11a).

The defendants named in the conspiracy indictment were the aforementioned Kahaner (who was Chief Assistant United States Attorney and later Acting United States Attorney in the Eastern District of New York), Keogh (then a Justice of the Supreme Court of New York) and Corallo, and also Robert M. Erdman and Sanford J. Moore;** six other persons were named as co-conspirators. The alleged conspiracy to obstruct justice was directed to a charge that Moore and other officers or employees of Gibraltor Amusements, Ltd. had been guilty of criminal concealment of assets in that firm's bankruptcy proceeding in the Eastern District of New York and that the defendants and co-conspirators under the instant indictment tried to influence or impede the indictment and punishment of Moore and his business associates for their alleged bankruptcy offenses.

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* "__a" refers to the printed "Appendix for Appellant Elliot Kahaner" in the appeal in the Court below. "Keogh App. __" refers to the printed "Appendix on Behalf of Appellant James Vincent Keogh" in the appeal in the Court below. "Gov't App. __" refers to the printed "Government's Appendix" in the Court below. Nine extra copies of each of the aforesaid appendices are on file in this Court.

** Erdman and Moore were severed from this trial, and they testified for the Government.

The opinion of the Court below reflected its recognition of the importance of this case and that its affirmance of the conviction might be deemed disturbing to a sense of justice (Appendix hereto, *infra*, pp. 12a-13a, 52a).

2. The Alleged Conspiracy

The Government's case of conspiratorial complicity on the part of petitioner Kahaner depended dispositively on the uncorroborated testimony of accomplice witnesses, principally Erdman and Moore, both of whom were of inordinately base credibility (*infra*). The opinion below noted that the Government's case "was based mainly on the testimony of Erdman and Moore—concededly interested witnesses—who received in return for their cooperation not only postponements of trial on their own indictments here, but, in Moore's case, a reduction from three years to one in his sentence on the bankruptcy charge" (Appendix hereto, *infra*, p. 4a), and that there was "much evidence adduced by defendants, which tended to discredit Erdman's and Moore's testimony in essential respects * * *" (*id.*, 12a).

Moore and his associates (Schwach, Kerner, Needleman, Cohen and Manacher) were arrested on January 5, 1961 in the Eastern District of New York on charges of concealing assets from the Trustee in Bankruptcy of a juke box enterprise ("Gibralton") on Long Island in which Moore had been principal officer and the others had been officers or employees (Appendix hereto, *infra*, p. 3a).

Robert M. Erdman, a physician, the Government's chief witness in this trial, conceived and performed the initial acts out of which arose the alleged conspiracy to obstruct justice by helping Moore, et al., in their troubles in the bankruptcy fraud prosecution. This initiating role of Erdman came about through the circumstance that one of

Moore's employees, Cohen (who had been arrested with the Moore bankruptcy group on January 5, 1961), had a cousin Deutsch, who did accounting work for Erdman, and Deutsch approached Erdman to try to help Cohen. Cohen accompanied Deutsch on a visit to Erdman for this purpose* (190a-191a, 199a-200a; Tr. 1928-1931; see also 188a-189a, Tr. 1878-1882; see also Gov't App. 125-127). The date of this visit of Deutsch and Cohen to Erdman is variously given by the Government's witnesses as having been shortly before or shortly after the middle of January 1961, and in any event it was quite soon after the arrest of the Moore group on January 5, 1961 (*ibid;* 22a). What is important about this first meeting of Erdman, Deutsch and Cohen is that both of the latter, testifying as witnesses for the Government, stated that they had theretofore already received information from the Moore group's attorney (Becker) or from one of Cohen's associates in the group to the effect that the Government had indicated it would indict two or three of the bankruptcy case defendants and drop the charges as to the others (including Cohen); and Deutsch and Cohen wanted Erdman's help in finding out if this was true (188a-189a, 199a-200a). The reason why this is important is that the Government contended at the trial—and both Courts below seemingly ignored the proofs (*infra*) to the contrary—that the proposal in which Deutsch and Cohen were interested, i.e., the proposal for dropping three of the defendants in the bankruptcy case, had been initiated by Kahaner himself in conversations with another Assistant United States Attorney, Mr. Williams. The actual record facts are that Kahaner's

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* A visit of a few days earlier by Deutsch alone to Erdman does not appear to be of significance for the issues of this case (Tr. 1878-1882; Government's App. 125-126). "Tr. " refers to to the stenographic minutes of the trial, to be filed herewith.

first entry into the situation came about when Erdman telephoned Kahaner on the day of the Deutsch-Cohen visit to Erdman's office—by which time, however, the attorney for the Moore group (Becker) had already held conversations with Assistant United States Attorney Williams in which the "three in, three out" arrangement had been proposed by Williams himself,* and, as seen, this information had already been conveyed to Deutsch and Cohen (121a, 179a, 180a, 185a, 188a-191a, 203a-206a, 212a-215a, Tr. 1958-1959, Tr. 1979-1997).**

After Erdman's initial phone call to Kahaner around mid-January 1961 matters developed, according to the Government, along the following lines (we quote from the opinion below, Appendix hereto, p. 4a, *infra*):

> "The Government's claim was that, following the first conversation between Erdman and Kahaner, a plan was devised whereby Kahaner would endeavor to arrange that only two or at most three of the persons arrested would be indicted (these not to include Cohen), and that later, after Kahaner found that the Assistant United States Attorney proposed to seek the indictment of three—Moore, Kerner and Schwach—the plan was broadened, so that, in Erdman's words, Kahaner 'would see to it that they [i.e., the men to be indicted] were treated softly by having the case brought before a specific judge in April, for which he [Kahaner] wanted $35,000'. * * *"

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* Williams' role throughout was unchallengedly proper and lawful (Appendix hereto, *infra*, p. 3a).

** The ways in which the glossing-over of these record facts (as to the already existing posture of the alleged conspiracy before the earliest arguable entry into it by Kahaner in January 1961) caused prejudice to Kahaner in the trial and appeal of this case, are brought out by circumstances noted *infra* (p. 21 et seq.) concerning the Trial Court's charge to the jury on this phase.

Thereafter, with Erdman as intermediary (still according to the Government's case), Moore accepted the aforementioned alleged proposal of Kahaner to pay $35,000 for Kahaner's assistance (*ibid*).

The accomplice witnesses themselves disagreed as to the date when Moore and Kahaner first allegedly met, Erdman saying that they met in his office on February 21, 1961 (32a-34a), and Moore testifying that he did not meet Kahaner until March 29, 1961 (133a, 141a). This question of when (and of how often) Moore and Kahaner may have met is important because, except for one alleged payment of $2500 to Kahaner by Moore on March 29, 1961, it is undisputed even under Erdman's (as well as Moore's) own testimony (Tr. 560-562, 565-566; Gov't. App. 68, 71) that all of the payments allegedly obtained by Erdman from Moore to be given to Kahaner were left by Moore with Erdman in Kahaner's absence and, according to Erdman, were later allegedly turned over by him to Kahaner—it being the contention of the defense that if Erdman did get any such money, he kept it for himself, and that his unsupported testimony of his unwitnessed deliveries of this money to Kahaner plainly suggested fabrication to conceal Erdman's own venality and his treachery to Moore. (As will appear, this defense theory was not presented to the Jury by the Trial Court.)

According to Erdman, Kahaner received from him a first payment of $5,000 one or two days after February 21, 1961 (32a-34a).

Erdman further testified that soon after this Kahaner told Erdman that "pressures" were being applied against Moore because of the latter's unsavory background, and suggested that Erdman see Justice Keogh of the New York Supreme Court for Kings County, and enlist his aid (Appendix hereto, *infra*, pp. 4a-5a).

This last noted testimony of Erdman as to how Keogh's name first came into the picture—i.e., that it was Kahaner's doing—is of special interest for the light it throws on Erdman's pattern of functioning in this whole situation. We have already noted that Erdman had taken it upon himself to initiate the "conspiracy" by dangling before the worried Cohen and Deutsch at the very outset the name of the Chief Assistant United States Attorney of the Eastern District, Elliot Kahaner. We are now to note, in regard to the question of how Judge Keogh's name first came into the picture, that, irreconcilable with Erdman's above testimony that petitioner Kahaner introduced Keogh's name late in *February* 1961, is testimony of the other principal accomplice witness, Moore, to the effect that Erdman himself claimed to Moore during *January* 1961, at the virtual outset of the Erdman-Deutsch-Cohen-Moore conversations, that Erdman had already interested Judge Keogh in the effort to help the Moore group (104a), thus affording further indication that Erdman was "dropping" the names of influential persons in a design to lure the Moore group into reposing their confidence—including their financial confidence—in Erdman himself.*

That Erdman did indeed have a sinister private motivation in thus "dropping" the names of the eminent New York Supreme Court Justice Vincent M. Keogh and the influential Chief Assistant in the United States Attorney's office in the Eastern District, petitioner Kahaner, was strikingly confirmed by the testimony of Moore himself, who described as follows his opening talk with Erdman in January 1961 (101a):

> "I explained to him about the amount of money that was involved. I said that the Wurlitzer Company

* The Government in its theory of the case never contended that Keogh entered the picture before the end of February or early March 1961.

> was suing me for over a million dollars and I said, 'I'm ready to retain counsel for over sixty thousand,' *and with that, when I mentioned the amounts of money, he became very attentive* and he said, 'Take it easy,' he says, 'and come down within the next few days with all your papers, all your civil papers that you have, because to me this sounds like a civil case, and maybe I can work this out with the U. S. Attorney since it looks to me like it is a civil matter. Maybe I can get him to see it along those lines.' So I was very happy, and I left." [Emphasis supplied]

Erdman, on the stand prior to this testimony of Moore, parried strenuously the cross-examiner's questions as to this already then potentially revealing item (60a-62a; Tr. 529, 530-531). Moore's testimony, as well as Erdman's own (and likewise the testimony of other co-conspirators) is replete with descriptions of Erdman's intensive and avid activities as the manager of the scheme to "fix" the Moore bankruptcy case (e.g., 105a-108a, 222a-227a; Tr. 420-422, 438, 440, 458, 460). As will appear, moreover, in connection with our recitals *infra* (pp. 15-16) concerning the subsequent "restitution" stage of the case—i.e., when the Moore group were later trying to improve their position by making restitution to the bankruptcy trustee—it was proved through disinterested testimony that Erdman made statements which strongly supported the defense contention that he had kept for himself the alleged $35,000 of bribe money.

We had reached the point, above, in our summary of the chronology of the Government's version of the case, where Keogh's name had come into the picture. According to the Government's case, Kahaner's plan had been to have Moore and the two others who were to plead guilty under the bankruptcy-fraud indictment appear for sentencing before United States District Judge Rayfiel; and the enlistment of Justice Keogh into this effort was allegedly deemed

necessary by Kahaner, as above noted, because associates of Judge Rayfiel on the Eastern District bench were taking a hand in the matter to ensure that Moore should be heavily punished. This was how the situation stood, according to the Government's case, around the end of February, 1961; the opinion of the Court below summarizes the subsequent events (as depicted by the Government's witnesses) as follows (Appendix hereto, *infra*, pp. 5a-6a— footnotes by the Court omitted):

> "* * * Around the end of the month Erdman went to the chambers of the Justice, who, according to Erdman's testimony, undertook to be of assistance for a monetary consideration, indicating his financial needs on a card he handed to Erdman, later supplemented by a second one, and also talking of a new car. Erdman testified that Kahaner advised him early in March that owing to a change in the assignments of the judges in the Eastern District, the schedule would have to be accelerated so that sentencing would occur in March, and that around March 7 another $5,000 supplied by Moore was paid to Kahaner and the same amount to Justice Keogh. It is established that, on March 9, Moore, Kerner and Schwach appeared before Judge Rayfiel and pleaded guilty, their attorney, Becker, stating that this was against his advice; the sentencing was set for March 30, on which day Judge Rayfiel would still be presiding.
>
> The Government's case, still resting basically on Erdman's and Moore's testimony, continued with a meeting of Kahaner, Moore and Corallo on March 15, at which Corallo emphasized the importance to him of Moore's not being sent to prison; a demand by Kahaner for the balance of the money; a meeting of Erdman, Moore and Kahaner at a Brooklyn coffee shop in the morning of March 29 at which Kahaner was paid an additional $2,500, followed by

> Erdman's going alone to Justice Keogh's chambers, paying him $17,500 and reminding him that the sentencing was scheduled for the following day; and a telephone call in Erdman's presence from the Justice to Judge Rayfiel arranging to lunch that day and asking that Judge Rayfiel bring with him the probation report on Moore."

The court below further noted in its opinion (*id.*, 6a—see also the footnotes by the Court at *id.*, 4a, 5a) that Kahaner, taking the stand at the instant trial, denied all of the above described inculpatory testimony concerning him; that Kahaner stated he had in fact been present in Erdman's office on February 21, 1961, but that he was there with a Dr. Feldman, who was to be examined as a medical patient by Erdman, that Kahaner did not see Moore there, and that Kahaner was never out of Dr. Feldman's presence, which Dr. Feldman confirmed at the trial herein*; also, Kahaner acknowledged telling Assistant United States Attorney Williams a few days before the guilty pleas by the Moore group on March 9, 1961 that those persons would plead guilty and that they would probably be sentenced by Judge Rayfiel, Kahaner testifying that this information had come to him from Erdman when Kahaner was in the latter's office as a patient, for surgery**. (See pp. 26-27, *infra*, for Kahaner's alibi defense concerning the alleged events of March 29, 1961.)

Judge Keogh, taking the stand in this trial, likewise denied all of the above described inculpatory testimony concerning himself (*id.*, 6a). He explained his financial discussions with Erdman as having occurred solely in a framework of close personal friendship (*ibid.*); and, as summarized in the opinion below (*id.*, 6a-7a):

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* Cf. p. 9, *supra*, where we noted Moore's own testimony that he did not even meet Kahaner at all until March 29, 1961.

** Erdman admitted such surgery on Kahaner (56a).

"He further agreed that Erdman had come to his chambers on the morning of March 29 * * *. The Justice's testimony was that Erdman introduced Moore as a lifelong friend who was in trouble, and wondered whether the Justice would ask Judge Rayfiel to look at Moore's 'background to see whether consideration can be given to him.' He thereupon made the telephone call arranging to lunch with Judge Rayfiel, although he denied asking Judge Rayfiel to bring along the probation report on Moore—a point on which his account was corroborated, and Erdman's contradicted, by Judge Rayfiel. At lunch, Keogh brought up the Moore case whereupon Judge Rayfiel said, in Keogh's words, 'that Moore was the most culpable, he was the worst offender in a bankruptcy fraud, the like of which he had not run into before, and that he could—whether background or anything else was considered—he could not consider him anything but a very unsavory character,' and also that two other federal judges had alerted him of rumors 'that everything has been taken care of' in regard to the Moore sentence. Erdman was told of this conversation by Keogh during the afternoon of March 29. It is not disputed that Erdman then informed Moore, who that evening told his attorney, Becker, that he wanted to withdraw his guilty plea.

Justice Keogh also conceded that at Erdman's request he arranged for Erdman to see Judge Rayfiel, on the morning of March 30 before the latter ascended the bench to sentence Moore and his co-defendants. Judge Rayfiel said that no leniency could be extended. * * *"

At the sentencing on March 30, 1961 Judge Rayfiel declined to allow the three indicted members of the Moore group to withdraw their guilty pleas, and he sentenced each of them (including Moore) to imprisonment (*id.*, 7a-8a).

The opinion below notes (*id.* p. 8a) that Judge Rayfiel, testifying at the instant trial, supported Judge Keogh's

denial of the testimony of Erdman and Moore that Judge Keogh had advance information from Judge Rayfiel about the prospective prison sentences.

The final stage of the alleged conspiracy consisted of the previously mentioned attempts by the Moore group to obtain alleviation from Judge Rayfiel by making financial restitution to the bankruptcy trustee. The summary of the testimony on this phase of the case, as given in the opinion below, includes the following (*id.*, 9a-11a):

> "According to Erdman and Moore, there were several meetings of the defendants in April, in the course of which Kahaner, among other things, suggested that the situation might still be saved or at least ameliorated by an offer of restitution from Moore. Justice Keogh and Kahaner agreed that they lunched with Erdman on April 5, but testified this meeting had been arranged before the sentencing —a fact substantiated by Kahaner's telephone record—for the purpose of enlisting the Justice's aid in a project to have Kahaner continue for some time under the newly appointed United States Attorney, and that Moore's case was not discussed. The concededly disinterested testimony of Joseph Jaspan, the attorney for the trustee in bankruptcy of Gibraltor Amusements, Inc., provides a thread through the events of April and May * * *. Later the Justice's office requested Jaspan to attend a meeting in chambers on May 22; * * *. Jaspan [stated] that the trustee was prepared to recommend acceptance of $50,000 in notes endorsed by Erdman, but that he 'had no way of knowing whether this would help them in the matter before Judge Rayfiel,' and that the offer must not be conditioned on a reduction of sentence, with Justice Keogh also emphasizing this: On May 31, Moore, * * * delivered to Jaspan a check signed by Erdman for $1,000, and a series of notes, twenty-four for $1,000

> and one for $25,000, made by Moore and endorsed by Erdman; he asked Jaspan to inform Judge Rayfiel of this. After an unsuccessful attempt to communicate with Williams, who, it was learned, had severed his connection with the United States Attorney's office, Jaspan called Judge Rayfiel for an appointment; the Judge was willing to make one only if a representative of the United States Attorney was present, and suggested that Jaspan call Kahaner, the Chief Assistant. After being referred by Kahaner to Kreindler, the chief of the Criminal Division, without result, Jaspan again called Kahaner, who agreed to attend * * *. Kahaner raised the point that a petition for certiorari to review this Court's affirmance of the adjudication in bankruptcy, * * *, was pending, and questioned whether the application for a reduction of sentence should be entertained unless the petition were withdrawn * * *."

Kahaner, testifying at this trial, denied any participation in the above described restitution phase except the telephone calls from Jaspan and his appearance before Judge Rayfiel on May 31, 1961 (275a-279a, 282a-283a).

3. Further As to the Proofs in Support of the Defense Theory That Erdman Was Engaged In His Own Venture to Get $35,000 From Moore

The Court below in its opinion (Appendix hereto, *infra*, pp. 33a-35a) noted the defense theory that Erdman intended from the outset to keep Moore's $35,000 for himself, that he did so, and that then, when his deed was discovered, he decided to implicate Kahaner, Keogh and Corallo in an effort to gain favor with the Government, Moore joining in the endeavor for the same reason. We have previously referred to the incident, testified to by Moore himself, that Erdman's cupidity had apparently been aroused when he learned that Moore was thinking of engaging a Washing-

ton, D. C. law firm for $60,000 plus disbursements. A principal item urged by the defense in support of this theory was that Erdman had represented in writing to the bankruptcy trustee, Mr. Christ, that he (Erdman) had security for $35,000 of the sum of $50,000 which Erdman had guaranteed under the Moore restitution plan. The opinion below concedes (*id.* 34a) that the defense was correct, and the Government incorrect, in its interpretation of Erdman's representation to Mr. Christ, i.e. that Erdman was in fact saying he had $35,000 of security. Moore's testimony describing Erdman's ardent initiative and unflagging promotion of the alleged $35,000 scheme lent credence to this defense theory that Erdman was engaged in a piratical adventure of his own (e.g. Tr. 1197-1202, 1204-1206, 1213, 1215, 1217, 1220, 1224, 1228-1231; see also Gov't App. 78-79). See also the testimony of Forman, a co-conspirator and Government witness, that when he demanded from Erdman return of the $35,000 on several occasions in April and May 1961 Erdman did not give him a satisfactory explanation and offered to pay back the $35,000 himself (229a-235a). Also, Moore had told the grand jury that he believed that Erdman kept the entire $35,000 despite his (Moore's) testimony at the trial that he personally gave Kahaner $ 0 and despite his statement to the FBI that he paid Kahaner the entire $35,000 (145a-146a, 150a). See also the testimony of co-conspirator Kerner, describing a conversation with Erdman after the sentencing of the Moore group in the bankruptcy case (223a), and the similar testimony of co-conspirator Schwach (225a-227a).

Erdman's support of the Moore plan for restitution of $50,000 to the bankruptcy trustee took a concrete form indeed. On the promissory notes which Erdman had endorsed he paid $1,000 per month for six months in 1961 (93a, 96a-97a, 301a-304a).

The Court below, in noting (Appendix hereto, *infra*, p. 34a) that Erdman had represented that he had security for $35,000, remarked that this was "a highly significant figure on defendant's theory" (*ibid.*). The opinion below then continued (*id.* 34a-35a):

> "* * * when taxed with this, Erdman said his statement as to security related to $35,000 in Ace Manufacturing Co.—an explanation which was attacked by Keogh's counsel in summation, which the Government does not attempt to elucidate in its brief, *and which we do not understand.* * * *" (Emphasis supplied)

The Ace Manufacturing Co. was a juke box manufacturing business in Baltimore, Maryland which was apparently controlled by Moore or in which he had an interest, and in which Erdman himself invested a sum of money very shortly after he first became acquainted with Moore in January 196- in connection with the bankruptcy-fraud matter. Erdman's testimony in this trial that he had $35,000 security in the Ace Manufacturing Co., the testimony which the Court below said it did not understand, appears at Tr. 837-838. It is not surprising that the Court below was unable to understand this assertion of Erdman, because the assertion is inexplicable in the light of his other testimony concerning his alleged investment in the Ace Manufacturing Company, where he variously said that his "investment" was $10,000 (Tr. 1047), and $17,000 (Keogh App. 181a), the latter figure being the highest which Erdman claimed—and of this latter $17,000 figure it would appear that at least $5,000 represented investment by another person (*ibid*). Furthermore, it was by no means clear from Erdman's testimony that his "investment" in Ace Manufacturing Co., in whatever amount, was in any way "secured" (Tr. 1033-1034, 1046-1049, 1061-

1063, 1091-1093, 1167-1168). In short, Erdman's attempt to explain his representation to the bankruptcy trustee's attorney—that he had $35,000 security—as relating to the investment in the Ace Manufacturing Company was a brazen falsehood and demonstrably so from Erdman's own testimony taken as a whole.

4. Cross-examination of Petitioner Kahaner With Respect to His Brokerage Accounts

We have set up this subheading in our statement of the case in order to preserve the point therein involved in the event of the granting of certiorari, and also as one of the cumulative instances of prejudice concerning petitioner Kahaner in this trial. The facts relating to this topic are recited in the opinion of the Court below (Appendix herein, *infra*, pp. 24a-26a). The pertinent testimony, i.e. what we assert to have been the improper interrogation of Kahaner (the Court below conceded that it was improper (*ibid*)), is printed at 289a-290a; the stipulation referred to in the opinion below (*supra*) wherein the Government conceded that this improper questioning was without foundation in fact is printed at 322a-323a.

5. Failure to Produce Jencks Act Material

Rose Kippe, Kahaner's secretary, testified for the Government in its direct case concerning Kahaner's telephone message book, Government Exhibit 80, and her and Kahaner's practice with respect to the book (243a-246a). Kippe then testified for the defense, and during her cross-examination by the Government she was questioned concerning a prior interview by the FBI (312a) (Government's Exhibit 91 marked for identification). Kippe's statement to the FBI was not given to the defense on either occasion of her testimony, although a demand was made by the defense for her prior statements (312a-313a). Furthermore, the trial court apparently even failed to examine Kippe's

statements before ruling (Tr. 2869-2872; 313a). At the outset of the trial it was agreed among all counsel that all "3500" material would be given to the defendants without the need for a formal request. Such practice was followed throughout the trial.

The defense also was not supplied by the Government with a statement of Dr. Fred Miller, an FBI document expert who testified on rebuttal as to certain obliterations in Kahaner's diary (241a-243a). The Government advised the Court of Appeals that it had a report by Dr. Miller made to the FBI (Appendix hereto, *infra*, p. 26a).

The Court below held that nonproduction of these Jencks Act statements was "harmless error" because the Kippe statement, which the Court said it had examined, "is in full accord with the very limited testimony given by Mrs. Kippe as a witness for the Government, which was not disputed by anyone"; and because the Miller statement, which the Court below likewise said it read, was "simply a summary of the findings to which Dr. Miller testified" (*ibid*).

6. The Trial Court's Charge to the Jury

A. The Trial Court did not charge the jury at all on the main theory of the defense, namely that Erdman had been engaged on a venture of his own to extract $35,000 from Moore and to keep the money for himself, as especially instanced by Erdman's representation to the trustee in bankruptcy, Mr. Christ, that he had $35,000 security for his guarantee of Moore's restitution payments. This omission in the charge was duly excepted to, but the Court declined to make a supplemental charge on this important subject on the ground that counsel had argued this defense theory to the jury and on the further ground that no request to charge on this point had been submitted (407a).

The Court below, after noting (as shown earlier, pp. 16-19, *supra*) that substantial proofs existed in the record in support of this defense theory, nevertheless declined to find error on this ground for the reason that "such an oral request made after the conclusion of the charge was too late under F. R. Crim. Proc. 30" (Appendix hereto, *infra*, p. 35a) and because—

> "The theory had been extensively argued in the opening on behalf of Keogh, and in the summation of Kahaner's counsel which also included the support allegedly afforded by Christ's testimony and Erdman's letter. * * * (*ibid*)

B. We have previously recited (pp. 6-8) the record facts which establish that negotiations on behalf of the Moore bankruptcy-case group looking to a compromise with the Government on the number of defendants to be indicted, etc. were already under way with Assistant United States Attorney Williams, who in fact had already tentatively concluded to recommend non-indictment of three of the group, before the entry or alleged entry of petitioner Kahaner into the picture. In its charge to the jury the Trial Court cited Williams' testimony that Kahaner inquired from him whether he would be satisfied with indictments against only two of the six defendants arrested (358a). The Court disregarded the earlier noted testimony of Deutsch supported by Cohen, Becker and Moore that Kahaner spoke to Williams merely to verify the authenticity of Becker's conversation with Williams that only two or three of those arrested would be indicted and the remaining two or three defendants discharged. Also, the Court failed to tell the jury that Deutsch testified that Kahaner suggested to Deutsch that Cohen, and others, could contact Williams directly for the purpose of cooperating with the Government. This testimony by Government witnesses would tend to prove Kahaner's innocence and

legitimate motive in talking to Williams and would negate the accusation of Kahaner's knowledge of or participation in the later demand by Erdman for $35,000 (188a-191a, 196a, 199a-200a). The Trial Court created a question of the intent and reason for Kahaner's inquiry to Williams where no real question existed.

Connected with the foregoing was the portion of the charge (382a-383a) quoted in the opinion below at Appendix A hereto, *infra*, 29a, fn, where the Trial Court told the jury it could convict Kahaner if they found that Kahaner spoke to Williams in January pursuant to a corrupt agreement with Erdman.

The Court below, in its opinion, stated concerning the defense objection on appeal as to this portion of the charge (Appendix hereto, *infra*, pp. 29a-30a):

> "The criticism is that there was no evidence that Kahaner had ever 'used his position as Williams' superior * * * to obtain suspended sentences for those indicted,' and also that, although there was evidence that Kahaner had made some inquiry in January whether Williams would be satisfied to indict two rather than three, there was no evidence that Kahaner had any arrangement with Erdman at the time for a cash consideration. The first criticism seems well taken; it may or may not be a sufficient answer to the second that the jury could have drawn an inference that Kahaner had already formulated an idea of seeking to obtain money from the prospective defendants in the bankruptcy case and thought that success in reducing the number to be indicted would enhance the interest of those who were. What is a sufficient answer to both criticisms is that no exception was taken, as required by F. R. Crim. Proc. 30, and that error was a long way from being so prejudicial as to attract the rule, F. R. Crim. Proc. 52(b), entitling us to notice. 'Plain errors or defects affecting substantial rights * * * although

they were not brought to the attention of the court." Right after the remarks quoted in the margin the judge said that "if you should find that no cash payment was made to Keogh or Kahaner," "2" there would be no basis for a finding of corrupt endeavor," and went on to say, "All counsel agree that the central and basic issue in the case is whether the money was paid over to Keogh and Kahaner"—a point which the summations had made abundantly clear. It is quite inconceivable that this jury, whose attention and intelligence are demonstrated so tellingly by the highly pertinent requests for evidence made during its deliberations, convicted Kahaner on the basis of his talk with the Assistant United States Attorney before any money was claimed to have been promised."

The above quoted statement in the opinion of the Court of Appeals did not reach the actual thrust of Kahaner's argument on this issue. Prior to the time when Kahaner spoke with Williams, Deutsch and Cohen already had information, transmitted to Erdman and via Erdman to Kahaner, that Williams had already decided to limit the indictment to only three persons of the Moore group, and that the Moore group already knew this. How, then, could Kahaner realistically expect money from the Moore group thro gh "success in reducing the number to be indicted" (as the opinion, *supra* speculatively suggests)? This important facet of the testimony, which we have repeatedly emphasized herein, does not appear to have engaged the attention of the Court below at all. The above quoted portion of the opinion does not reach the point that the record in fact is devoid of any support whatever for the Trial Court's charge permitting the Jury to convict Kahaner if he had an agreement with Erdman at the stage in question (January 1961), it being undisputed that the earliest alleged date of such alleged agreement was Febru-

ary 10, 1961 (see our discussion under "C.", immediately below).

C. The Trial Court in its charge to the jury described the alleged meeting at which the $35,000 plan was first put by Erdman before Moore, Deutsch and Cohen (358a-359a) (quoted in Appendix hereto, *infra*, p. 36a, fn.).

As noted in the opinion below (*id.*, 36a-39a), the defense urged two errors as to this portion of the charge. The first concerned the dates assigned by the Trial Court to the telephone call from Kahaner to Erdman and Erdman's meeting with Moore, Deutsch and Cohen. As acknowledged in the opinion below (*id.* 36a), Moore repeatedly testified that the meeting at which Erdman first asked for money was on February 10, or "a day either way, the 10th or 11th". The opinion below likewise acknowledged the importance of this date given by Moore (*ibid*)—in contrast with the date (past the second week of February) stated in the Trial Court's above cited charge—as being

> "* * * that Kahaner concededly was on a vacation in the Caribbean from February 2 to 13; hence, if the meeting was on February 10 and 11, Kahaner could not have called Erdman shortly before it as Erdman claimed. * * * "

The opinion below also notes that Kahaner's counsel took proper exception to the Trial Court's failure to call the jury's attention to Moore's testimony as to the dates (*ibid*), and it went on to say (*id.* 37a):

> "Although it would have been better if the judge had done so, we do not find his refusal to modify his charge to have been prejudicial. The charge itself was accurate: Erdman had fixed the call from Kahaner as 'past the second week of February.' Moreover, Moore himself on direct examination had first described the meeting as being 'About the middle

> of February', and during his cross-examination, even before Kahaner's counsel had gotten him thoroughly committed to February 10 or 11 as the date of the meeting, Moore had altered the date of the delivery of the money from February 10, as he had testified on the previous day, to February 20—a date consistent with Erdman's fixing the telephone call at a date after Kahaner's return. Deutsch and Cohen also placed the meeting during the week of February 12. More important, the point as to the date had been developed by Kahaner's counsel on summation with such skill and vigor that it must have been deeply impressed on the jury's mind—an impression that ought to have been reinforced by the judge's saying, in his summary of Kahaner's defense, 'that shortly thereafter [i.e., after his talk with Williams] he left for a holiday and did not return to the United States until February 14th.' * * *."

The second of the defense objections against the above quoted portion of the charge concerned the Trial Court's statement that the four participants in the meeting, although bickering as to some matters, "appeared to be in accord that Kahaner's proposal for a payment to him of $35,000 was submitted by Erdman at that meeting". Of this the Court below said (Appendix hereto, *infra* pp. 38a-39a):

> "This was not correct. The four participants were in accord that a $35,000 payment was proposed, and Erdman and Moore were in accord that Erdman had characterized the proposal as coming from Kahaner and as being for a payment to him. But Deutsch testified only that 'Dr. Erdman told Mr. Moore that he thought he could do something for him, that it would cost $35,000. And he said he is doing it for my cousin,' that was the only reason that he had gotten involved." Cohen said on direct examination 'At that time Dr. Erdman told him [Moore] that $35,000

would take care of it"; under cross-examination he elaborated that he believed at the time that the $35,000 was going to a lawyer for his fee.

Analyzing the record from our vantage point, the variance can be deemed quite significant. Throughout the trial no witness save Erdman and Moore testified that Kahaner ever sought a payment or that any payment was made; corroboration of Erdman's mention of a Kahaner proposal for a payment, even from co-conspirators such as Deutsch and Cohen, would thus be important, and their failure to recount this even more so. We find no indication, however, that any such significance was attributed to the judge's slip by anyone at the trial. No exception was taken by defense counsel; * * *, it is [a] defiance of reality to suppose that this mistaken reference, which did not attract any objection from attentive counsel, lingered in the jury's mind."

Another item, similar to the one above noted in regard to Kahaner's concededly having been on vacation during the first part of February 1961, was not mentioned in the opinion below. Erdman and Moore testified that Corallo, Kahaner, Moore and Erdman met on April 3 at 4:00 P.M. when Kahaner allegedly recommended the restitution plan and demanded an additional $5,000 for his continued help (44a-45a, 114a, 366a). Rose St. George, a witness for the Government, testified that on April 3, from 4:00 P.M. until past 5:30 P.M. Kahaner was present at a party in the Grand Jury room in the Federal Court House in Brooklyn celebrating his designation in public ceremonies at 10:00 A.M. of that day as United States Attorney (242a-243a).

D. Similar also to the preceding items was the matter of the Trial Court's treatment of petitioner Kahaner's defense of alibi with regard to the crucial alleged meeting among the conspirators on the morning of March 29, when

Kahaner is alleged to have received a $2,500 payment directly from Moore—the only such claimed incident in the Government's entire case. Kahaner's alibi was that during the time of this alleged meeting he was conferring with Judge Harry Frank of the New York Supreme Court. The record facts as to this are partially summarized in the opinion below (Appendix hereto, *infra*, pp. 41a-43a), the Court below remarking of Kahaner's proof and contentions on this matter that, as in the case of other similar items asserted on behalf of Kahaner, they "were excellent points on Kahaner's behalf." (*Id.* 43a). Nevertheless, in response to Kahaner's argument that the Trial Judge had unfairly and insufficiently presented to the jury certain of the critical details of Kahaner's defense of alibi as to this incident, the Court of Appeals said merely that "if the judge's summary of the evidence is to be a summary, it has to stop somewhere" (*ibid.*), and that the Trial Court had also omitted some of the Government's "ripostes" on this issue (*id.* 43a-44a). The particularly important testimony of Judge Frank himself which Kahaner contended was not fairly or sufficiently presented to the jury is printed at 318a-320a; see also Government Exhibit 81, which establishes that on the morning of March 29, Kahaner was in the Supreme Court until 10:00 A.M. (426a); and see also the testimony of Kahaner's secretary, Rose Kippe, at 307a-309a. Here, once again, we see the Court below resolving important points of dispute in the Government's favor on one or another sort of approach in the nature of "harmless error".

7. The Allen Charge

Petitioner Kahaner respectfully adopts the factual statement contained in the petition on behalf of Keogh as to the subject matter of the above heading. Petitioner Kahaner

would also respectfully state that in so treating the issue of the "Allen Charge" on an adoptive basis he intends no minimizing of its importance to his cause before this Court. On the contrary, for the reasons hereinafter stated (pp. 31-35, *infra*), petitioner Kahaner deems the issue of the Allen Charge to be a point of climactic importance in this case.

Reasons for Granting the Writ

1. The dramatic impact of this case upon the public mind throughout the country reflects the observer's sense of being present at an event of historic importance. Rare in this country's history have been criminal charges of the kind here involved—charges that high public officials have sold or tried to sell justice in the federal courts; rarer still have been the cases in which such charges have been sustained. Borkin, *The Corrupt Judge* (1962).

The judgments of conviction in this case bear not only upon the individual defendants. The judgments also cast a cloud upon the integrity of the administration of federal criminal justice. So long as these convictions stand, men will believe that a pollution of federal justice did happen or was attempted at the hands of high official personages in the year 1961 in the Federal Eastern District of New York.

This is a condition of affairs of which the Supreme Court of the United States cannot but take cognizance. The matter falls, *par excellence*, within this Court's peculiar province as guardian of the wholesome administration of federal criminal justice. The cloud cast by this case over that important area of this Court's wardship should not be suffered to remain as a permanent emblem of national discredit unless and until this Court makes a final pronouncement, on the merits, that so it must be and remain.

The writ should be granted in this Great Case, then, if for no other reason than that the Nation may have the opportunity to obtain an ultimate decision such as can come only from this Supreme Bench, as to the need, *vel non*, for the Nation to resign itself permanently to the recordation of national demerit which is an inevitable byproduct of the judgments rendered against the several individual defendants in this case.

The reasons of national policy which we are herewith urging for the granting of the writ find justification not only in the specific area of this Court's provenance above mentioned (supervision of the administration of federal criminal justice), but they draw support also from more fundamental portions of this Court's certiorari jurisdiction. During the formative years of the modern certiorari jurisdiction this Court enunciated the test of "the importance of the question involved", giving as a prime example the case in which "some matter affecting the interests of this nation in its internal or external relations, demands such exercise". *Forsyth* v. *Hammond*, 166 U. S. 506, 514-515 (1897).

We hasten to assure the Court that we are not asking for certiorari *in vacuo*, as it were, simply because this is a notable case in its factual impact upon the life and thought of the Nation. We formally pray for this certiorari because we are convinced that the judgment sought to be reviewed is wrong on its merits; we would not invoke the national importance of the factual issues of the case if the prospect of a reversal of the judgment below were frivolous, or indeed anything less than substantial.

Before turning to the reasons of a more specific character which favor the granting of the writ, we would respectfully recall to the Court certain circumstances in connection with the certiorari proceedings of a quarter century ago

in the case of Circuit Judge Martin T. Manton (*Manton v. United States*, 309 U. S. 664 (1939)—denying certiorari). The distinguished counsel, Mr. William E. Leahy, who petitioned this Court for certiorari on Manton's behalf, concluded the petition with a plea similar to the one we have above urged. Mr. Leahy stated (Pet. for Cert. in No. 645, October Term 1939, pp. 16-17):

> "From a broad viewpoint it serves no public policy for a high judicial officer to be convicted of a judicial crime. It tends to destroy the confidence of the People in the Courts. If there is a reasonable chance that this petitioner is not guilty or that he has not received a legally fair trial, it is in the public interest that this Court should review this case.
>
> * * * * *
>
> Petitioner would welcome this Court's granting certiorari herein, believing that if petitioner is unable to clear himself before this Court, he deserves any denunciation this Court might give."

What is perhaps even more interesting in connection with the *Manton* certiorari proceedings is that the Solicitor General acknowledged the soundness of Mr. Leahy's above quoted approach to the situation, and even went so far as to say that the Government would have joined in the request for certiorari on the grounds of high policy advanced by Mr. Leahy, but for the fact that the Government could not see any doubt as to the rightness of the conviction of criminal guilt in the *Manton* case. We quote the conclusion of the Government's Brief in Opposition, signed by Solicitor General Biddle (pp. 27-28):

> "Petitioner stands convicted of selling justice in the Federal courts. Few indictments in their [*sic*] history have contained a charge of greater gravity, either to the defendant or to the nation. The petitioner and the United States as a whole are equally

entitled to the most scrupulous examination of the truth of the charges. This, we submit, has already been given. The jury, the trial judge, and the Court below have considered the evidence and the law with painstaking care. If we saw any doubt whatever as to the accuracy of the result, we should join in the request that this Court also review the case. But, since we see no ground for any doubt as to the decision below, we feel constrained to ask that the petition for a writ of certiorari be denied."

How differently from the *Manton* case this case stands in point of the issue as to "doubt" of guilt needs no further demonstration than is afforded by recalling the repeated expressions in the opinion below by Circuit Judges Friendly, Clark and Waterman to the effect that the question of the guilt of the defendants was indeed one of reasonable doubt in this case.

We therefore, in all respectful earnestness, call upon the Solicitor General to act in the spirit of his distinguished predecessor, Mr. Biddle, who, had he been faced in the *Manton* case with a trial record comparable to ours, may confidently have been expected to join in the request for certiorari conformably to his concluding argument before this Court in the Government's Brief in Opposition in the *Manton* case as above quoted.

2. The Court below rejected the appellants' contention that even if the Court should hold that no one of the matters urged by appellants would alone call for a reversal, the points should be viewed in combination and for their cumulative effect upon the fairness of the trial (Appendix hereto, *infra*, 52a-53a). In petitioner Kahaner's petition for a rehearing in the Court below, this matter of the cumulative effect of the errors urged was additionally developed, with a view to preserving points for consideration by this Court along the lines now to be proposed—the petition for

rehearing was, of course, considered and denied by the Court below on the merits.

The cumulation of trial errors in this case as depicted in our Statement of the Case, *supra*, when weighed in the setting of the closeness of the factual issue of guilt or innocence under the rule of reasonable doubt, should be considered in the following light: In recent decades there has occurred a gradual dilution of several of the chief traditional standards of fair trial in federal criminal cases, resulting in a condition at the present time which may not unfairly be described as a general degradation of the overall standards of trial fairness in federal criminal proceedings. The instant case is distinctively one in which the highest Court of the land may properly be asked to review the convictions as a test of this overall degradation process.

Without the degraded trial standards of which we are speaking—in a moment we shall be specific—a high ranking federal law enforcement official of unblemished prior reputation like Elliott Kahaner—not to say also petitioner Keogh—could never have been convicted in this case. Without these degraded standards the case could not have gone to the jury in the way it did (indeed it could not have gone to the jury at all—see *infra*), the entire fact-trying structure could not have been what it was, the trial as a whole could not have been what it was, the trial as a whole could not have happened the way it did.

The degradation of standards of which we speak has gone so far that distinguished personages of unblemished repute can be as easily destroyed in today's federal criminal "trial" forum as can persons of the most sordid background.

The degraded standards above referred to will now be summarized (not necessarily in the order of their importance):

First and *second*, the conspiracy-indictment device (e.g. *United States* v. *Agueci*, 310 F. 2d 817 (C.A. 2 1963)), plus the rule of admissibility of uncorroborated accomplice testimony (see authorities *infra*) render fair trial of the issue of individual guilt or innocence very difficult to secure owing to the combined effect of guilt by testimonial association and intrusion into the proof of low-quality evidence which, in turn, *third*, results in undercutting the protective principles of presumption of innocence and reasonable doubt.

We especially urge that this is a suitable case in which this Court should reexamine and modify the federal rule that accomplice testimony does not require corroboration. Kahaner's conviction was based solely on such testimony. In the circumstances of this trial, where the Government's case against petitioner Kahaner was solely dependent upon the testimony of alleged accomplice witnesses whose credibility was of the basest character, whose motives of self-preservation were of the most compelling sort, and whose testimony was undisputedly ridden with discrepancies and falsities on vital points, a proper situation is presented, in the interest of the fairness of federal criminal justice, for modification of the usual federal rule dispensing with the need for corroboration of accomplice testimony. The only explicit declaration which has ever been made on the subject by this Court is merely a statement that no absolute requirement of such corroboration exists. *Caminetti* v. *United States*, 242 U. S. 470, 495-496. Ample precedent exists in other jurisdictions for the requirement of corroboration of accomplice testimony. *Wigmore On Evidence* (3d Ed.) §§ 2056-2059. Another panel of the Court below, sitting in another recent appeal, expressed itself concerning the use of uncorroborated accomplice testimony in language between whose lines may be read the judicial dissatisfaction

with the existing rule (*United States* v. *Persico*, 305 F. 2d 534, 535-536 (C.A. 2 1962)).

Fourth, further as to the impact in this case of the way in which the rule of reasonable doubt was administered by court and jury, the overall degradation of standards above noted emphasizes the need for consideration, by this Court, of the earnest and scholarly proposals of Circuit Judge Jerome Frank in his concurring opinion in *United States* v. *Castro*, 228 F. 2d 807 (C.A. 2 1956), that the federal trial and appellate courts should determine whether a criminal case is improper for submission to the jury because reasonable men could not differ in believing that a reasonable doubt exists—we do not think it is necessary to emphasize how aptly the aforesaid proposed rule would apply in the instant case. Indeed, there is language in the opinion below in the instant case which indicates that the Court of Appeals might itself deem this case a strongly appropriate one for applying Judge Frank's proposals if authoritative encouragement in that direction were to come from this Court, for the opinion below (Appendix hereto, *infra*, 52a) refers to this case and to this jury trial as ones "where there was such real basis for the existence of reasonable doubt". Does not this description cry out for at least some rule of flexibility or selectivity whereby the canon urged by Judge Frank could be applied in a case such as this one?

With respect to the above four numbered items in what we have termed the process of degradation of fair trial in federal criminal cases, we submit that even if the points had not been preserved by us for consideration by this Court through our having presented them to the Court below in our petition for rehearing, the points could still be considered by this Court. On issues of right so fundamental as these, and notwithstanding the omission of the defense in not urging or preserving its position on all of

said issues in the Trial Court,* it is submitted that this Court may consider the points under the authority of Rule 52(b) of the Federal Rules of Criminal Procedure. Cf. *United States* v. *Sherman*, 200 F. 2d 880, 883 (C.A. 2 1952); *Jackson* v. *United States*, 221 F. 2d 883 (App. D.C. 1955); *United States* v. *Modern Reed & Rattan Co.*, 159 F. 2d 656, 658 (C.A. 2 1947), *cert. den.* 331 U.S. 831.

A *fifth* item in the degradation progress of which we have been speaking is, of course, the "Allen charge" issue (fully treated in the companion petition on behalf of Keogh, which we adopt on this issue). The "Allen charge" issue caps all of the foregoing, i.e., despite all of the degraded standards which were applied in this case the jury still had to be practically dragooned into a conviction.

We feel constrained to mention also that in our petition for rehearing in the Court below we urged that the drastic statistical reduction in recent years in the number of criminal appeals which this Court can handle under the heavy load of its certiorari jurisdiction places upon the federal Courts of Appeal a commensurately heavier responsibility to preserve the basic safeguards of fair trial. This case, both in overall due process terms and in terms of the fair administration of federal criminal justice, was a compelling instance of the need for exercising this responsibility at the federal Court-of-Appeals level. The need was not met in the Court below in this instance; we now have no place else to turn but to this Court.

3. Our Statement of the Case, *supra* (and see also the companion petitions on behalf of Corallo and Keogh), treats at some length the defense criticisms addressed to the Trial Court's charge to the jury—viz., the failure to make any mention whatever of the defense theory that Erd-

* But see Keogh App. 586a-588a.

man was engaged in his own venture to obtain $35,000 from Moore and that he got the money and kept it (pp. 15-19, 20-21 *supra*); the failure to depict properly to the jury that the Moore group had obtained from Assistant United States Attorney Williams a tentative promise as to the number who would be indicted, prior to any claimed entry by Kahaner into the picture (pp. 21-24, *supra*); the failure to instruct the jury properly concerning Kahaner's absence on a vacation during the crucial meeting of on or about February 10, 1961 (pp. 24-25, *supra*); the outright misstatement to the jury as to what the four alleged conspirators of the Moore group all agreed had happened at the aforesaid meeting (pp. 25-26, *supra*); and the failure to instruct the jury properly concerning Kahaner's alibi with regard to his visit to Judge Frank on the vital date of March 29, 1961 (pp. 26-27, *supra*). To these is to be added, of course, the overall criticism of the charge, which is more fully developed in the Keogh petition herein, to the effect that the marshaling of the evidence was prejudicially one-sided in virtually ignoring the defense cross-examination and in being heavily overweighted in favor of presentation of the Government's claims.

As seen, the Court below found, repeatedly and with respect to each of these criticisms of the charge to the jury, that error had indeed actually or possibly occurred but that it was "harmless" or otherwise without effective legal significance for the purposes of the appeal. In support of these conclusions the Court below, as seen, addneed, variously, the failure of counsel to make timely exceptions or requests, the remoteness or otherwise insufficient seriousness (in the Court's estimation) of the conceded errors, or, as in the matter of the Trial Court's failure to charge the jury concerning the defense theory of Erdman's having his own private piratical project, that the jury had been

sufficiently informed about this *via* the statements of counsel. On this last-mentioned item in the reasoning of the Court below, we especially adopt the treatment in the companion petition on behalf of Keogh; and we expressly join in the contention of petitioner Keogh that the novel doctrine enunciated by the Court below to the effect that an admittedly erroneous omission from a Trial Court's charge to a jury, even on a matter of the utmost seriousness in a criminal case, is inconsequential if the lawyers for the defendants have spoken to the jury on the same subject, is unsound and is highly dangerous to the entire fabric of fair trial in federal criminal prosecutions, so that the intercession of this Court to correct this novel departure while it is still aborning is urgently needed.

We respectfully adopt also the arguments and authorities presented in the petition on behalf of Keogh with respect to the right of a criminal defendant to have instructions presented to the jury relating to any theory of defense for which there is any foundation in the evidence.

It is submitted that the above mentioned errors in the charge to the jury, when considered in the entire setting of this case (including its importance to the national interest, as suggested in our first numbered Reason for the granting of the writ, *supra*), and when considered furthermore in connection with the capping destructiveness of the "dynamite" *Allen* charge, present a situation of sufficient seriousness and concern in point of the maintenance of the standards of fair trial in federal criminal prosecutions to justify this Court in granting certiorari pursuant to its function of supervising the administration of federal criminal justice.

4. Certiorari is appropriate in this case on the ground, without more, of the denial to petitioner Kahaner of the

Jencks Act statements referred to at pp. 19-20, *supra*. At this comparatively late date in the administration of the Jencks Act it is hardly necessary to cite authority for the proposition that the defendant's right to statements under 18 U.S.C. § 3500 does not depend upon whether a trial judge believes such statements can be utilized effectively by the defendant. *Clancy* v. *United States*, 365 U. S. 312; *United States* v. *Prince*, 264 F. 2d 850 (C.A. 3 1959); *Bergman* v. *United States*, 253 F. 2d 933, 935 (C.A. 6 1958). Circuit Judge Charles E. Clark, concurring in *United States* v. *Cardillo*, 316 F. 2d 606, 616-617 (C.A. 2 1963), spoke words which have a remarkable aptness for the instant situation and which contain a remarkable summons for this Court to intercede in a certain class of Jencks Act cases of which the instant case, we submit, is an example.

5. Petitioner Kahaner respectfully adopts, insofar as applicable to his case, all of the grounds for certiorari advanced on behalf of petitioners Corallo and Keogh which have not previously herein been specifically mentioned.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

WILLIAM W. KLEINMAN and
EUGENE GOLD,
Attorneys for Petitioner,
Elliott Kahaner,
66 Court Street,
Brooklyn 1, New York.

Dated: July 25, 1963

[Appendices follow]

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 253—October Term, 1962

(Argued March 8, 1963 Decided April 25, 1963)

Docket No. 27784

UNITED STATES OF AMERICA,

Appellee,

v.

ELLIOTT KAHANER, ANTONIO CORALLO and JAMES VINCENT KEOGH,

Appellants.

Before:

CLARK, WATERMAN and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the District Court for the Southern District of New York, Edward Weinfeld, Judge, in which defendants were convicted, on a jury verdict, for conspiring to violate 18 U. S. C. § 1503. Affirmed.

MURRAY I. GURFEIN (John P. McGrath) (Henry G. Singer, Orrin G. Judd, Jacob W. Heller, of Counsel), New York, New York, *for Appellant, James Vincent Keogh.*

Appendix A—Opinion of United States Court of Appeals.

WILLIAM W. KLEINMAN (William W. Kleinman and Eugene Gold), Brooklyn, New York, *for Appellant, Elliott Kahaner.*

MICHAEL P. DIRENZO, New York, New York, *for Appellant, Antonio Corallo.*

WILLIAM G. HUNDLEY and JOHN F. LALLY, Attorneys, Department of Justice (Robert M. Morgenthau, United States Attorney for the Southern District of New York), (Nathan Lewin, Walter T. Barnes, Philip T. White, Attorneys, Department of Justice, on brief), *for Appellee.*

FRIENDLY, *Circuit Judge:*

Elliott Kahaner, Antonio Corallo and James Vincent Keogh appeal from a judgment of conviction in the District Court for the Southern District of New York upon a verdict after a jury trial, presided over by Judge Weinfeld. The indictment charged that they, Robert M. Erdman and Sanford J. Moore conspired with each other and with six co-conspirators corruptly to influence, obstruct or impede the due administration of justice or to endeavor to do so, in violation of 18 U. S. C. § 1503. The case to which the alleged conspiracy was directed was a charge that Moore and other officers or employees of Gibraltor Amusements, Ltd., had been guilty of criminal concealment of assets in that firm's bankruptcy proceeding in the Eastern District of New York; various overt acts were placed in the Southern District. Trial of Erdman and Moore, the Government's principal witnesses against the three appellants, was severed.

Appendix A—Opinion of United States Court of Appeals

The indictment and trial in this case attracted particular attention because of the identity of two of the appellants—Keogh, a widely known and respected Justice of the Supreme Court of New York for Kings County, and Kahaner, who had served as Chief Assistant United States Attorney and later Acting United States Attorney for the Eastern District. No suggestion has ever been made that the due administration of justice was in fact obstructed; the evidence does not reflect in the slightest degree on former Assistant United States Attorney Averill M. Williams, who was in direct charge of the prosecution in the Eastern District or on Judge Leo F. Rayfiel, before whom Moore and the other defendants in that prosecution came for sentencing.

On January 5, 1961,[1] Sanford J. Moore, Sherwood Schwach, Allen Kerner, Alvin Needleman, Jacob Walter Cohen, and Abraham Manacher were arrested in the Eastern District on charges of concealing assets from the trustee in bankruptcy of Gibraltor Amusements, Ltd., a juke box enterprise on Long Island of which Moore had been vice president and principal officer, and the others had been officers or employees. Cohen, who had been a relatively minor employee, had a cousin, Seymour Deutsch, who did accounting work for Dr. Robert Erdman, a Manhattan physician. At the instance of Deutsch and later of Cohen, Erdman communicated some time in January with Kahaner, then Chief Assistant United States Attorney for the Eastern District, who was both a patient and a friend. At

1 All dates in this opinion are in 1961, when the conspiracy is claimed to have occurred and was later investigated, except in Part III where the dates relate to the trial in 1962.

this point the evidence diverges. The following statement is drawn from the Government's case, which was based mainly on the testimony of Erdman and Moore—concededly interested witnesses—who received in return for their cooperation not only postponements of trial on their own indictments here but, in Moore's case, a reduction from three years to one in his sentence on the bankruptcy charge.

The Government's claim was that, following the first conversation between Erdman and Kahaner, a plan was devised whereby Kahaner would endeavor to arrange that only two or at most three of the persons arrested would be indicted (these not to include Cohen), and that later, after Kahaner found that the Assistant United States Attorney proposed to seek the indictment of three—Moore, Kerner and Schwach—the plan was broadened, so that, in Erdman's words, Kahaner "would see to it that they [i.e., the men to be indicted] were treated softly by having the case brought before a specific judge in April, for which he [Kahaner] wanted $35,000". After some hesitation Moore accepted the proposal, in part at the urging of Corallo, with the understanding that $15,000 was to be paid before sentencing, and that Corallo would hold the remaining $20,000 until thereafter. Moore and Kahaner first met in Erdman's office on February 21[2] and Kahaner was paid $5,000 a day or two later. Shortly thereafter Kahaner told Erdman "pressures" were being applied against

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2 This was Erdman's testimony; Moore testified he did not meet Kahaner until March 29. Although Kahaner was in Dr. Erdman's office on February 21, he testified that he was there with a Dr. Feldman, who was to be examined by Dr. Erdman, that he did not see Moore there, and that he was never out of Dr. Feldman's presence, as Dr. Feldman also testified.

Moore because of the latter's unsavory background, and suggested that Erdman see Justice Keogh of the New York Supreme Court for Kings County, and enlist his aid. Around the end of the month Erdman went to the chambers of the Justice, who, according to Erdman's testimony, undertook to be of assistance for a monetary consideration, indicating his financial needs on a card he handed to Erdman, later supplemented by a second one, and also talking of a new car. Erdman testified that Kahaner advised him early in March that owing to a change in the assignments of the judges in the Eastern District, the schedule would have to be accelerated so that sentencing would occur in March, and that around March 7 another $5,000 supplied by Moore was paid to Kahaner and the same amount to Justice Keogh. It is established that, on March 9, Moore, Kerner and Schwach appeared before Judge Rayfiel and pleaded guilty, their attorney, Becker, stating that this was against his advice;[3] the sentencing was set for March 30, on which day Judge Rayfiel would still be presiding.

The Government's case, still resting basically on Erdman's and Moore's testimony, continued with a meeting of Kahaner, Moore and Corallo on March 15, at which Corallo emphasized the importance to him of Moore's not being

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3 Becker also testified that he first learned of his clients' intention to plead guilty when he met them outside the courtroom that morning. Assistant United States Attorney Williams testified that a few days earlier Kahaner had informed him that Moore, Schwach and Kerner would plead guilty and, when Williams expressed disbelief, "indicated to me again that they would plead guilty and that they would probably be sentenced by Judge Rayfiel." Kahaner acknowledged telling Williams of the prospective plea; he said this information had come from Dr. Erdman when he was in the latter's office as a patient.

sent to prison; a demand by Kahaner for the balance of the money; a meeting of Erdman, Moore and Kahaner at a Brooklyn coffee shop in the morning of March 29 at which Kahaner was paid an additional $2,500, followed by Erdman's going alone to Justice Keogh's chambers, paying him $17,500 and reminding him that the sentencing was scheduled for the following day; and a telephone call in Erdman's presence from the Justice to Judge Rayfiel arranging to lunch that day and asking that Judge Rayfiel bring with him the probation report on Moore.

Kahaner and Keogh categorically denied everything relating to them which is recited in the two foregoing paragraphs, with the exceptions indicated in notes 2 and 3 as to Kahaner and the following exceptions as to Keogh: The Justice conceded handing Erdman two cards, the first card being an estimate of the costs of renovating his summer home and the second, on his testimony, a request for a loan, but placed the date well after the sentencing and explained these as innocent indications of his financial situation given to a close personal friend. He further agreed that Erdman had come to his chambers on the morning of March 29, but said Erdman was accompanied by Moore and another man. The Justice's testimony was that Erdman introduced Moore as a lifelong friend who was in trouble, and wondered whether the Justice would ask Judge Rayfiel to look at Moore's "background to see whether consideration can be given to him." He thereupon made the telephone call arranging to lunch with Judge Rayfiel, although he denied asking Judge Rayfiel to bring along the probation report on Moore—a point on which his

account was corroborated, and Erdman's contradicted, by Judge Rayfiel. At lunch, Keogh brought up the Moore case whereupon Judge Rayfiel said, in Keogh's words, "that Moore was the most culpable, he was the worst offender in a bankruptcy fraud, the like of which he had not run into before, and that he could—whether background or anything else was considered—he could not consider him anything but a very unsavory character," and also that two other federal judges had alerted him of rumors "that everything has been taken care of" in regard to the Moore sentence. Erdman was told of this conversation by Keogh during the afternoon of March 29. It is not disputed that Erdman then informed Moore, who that evening told his attorney, Becker, that he wanted to withdraw his guilty plea.

Justice Keogh also conceded that at Erdman's request he arranged for Erdman to see Judge Rayfiel on the morning of March 30 before the latter ascended the bench to sentence Moore and his co-defendants. Judge Rayfiel said that no leniency could be extended. The stenographic transcript shows that when Moore, Kerner and Schwach appeared in court, Becker moved for leave to withdraw their guilty pleas, whereupon Judge Rayfiel remarked that this was "shall I say, very palpable, and I am sure that you know just what I mean": that after some colloquy, during which Assistant United States Attorney Williams opposed withdrawal of the pleas, the case was placed at the bottom of the sentencing calendar; that a conference was then had in chambers during which Judge Rayfiel said to Becker, among other things, that he believed he had "more information that you have with respect to certain phases of this matter"; and that, on return to open court,

the motion for leave to withdraw the pleas of guilty was denied, and Moore, Schwach and Kerner were sentenced for terms of three years, two years and fifteen months respectively.

Beyond this assured core of fact as to what transpired between the lunch of March 29 and the sentencing on March 30 lie great areas of controversy. There is a sharp conflict whether or not the account given by Keogh to Erdman included the prospective sentences, Erdman and Moore saying that it had and Keogh denying this, a denial supported by Judge Rayfiel's testimony that he had not imparted this information to Keogh. There is likewise conflict whether the appointment for Erdman to see Judge Rayfiel was made by Justice Keogh in the afternoon of March 29, as Erdman asserted, or on the morning of March 30, as Justice Keogh and Judge Rayfiel testified. Moreover, Erdman, and Becker as well, testified that *after* Erdman's interview with Judge Rayfiel early on March 30 they went to the chambers of Justice Keogh; Erdman testified that he reported his lack of success with Judge Rayfiel and asked Keogh to call the Judge again, whereupon, according to Erdman, Keogh picked up the telephone and apparently did so; Becker, who said he was excused from the room for most of the time that Keogh and Erdman were talking, testified that while he was inside it, Keogh told Erdman, "Go see him again." Erdman and Becker testified that they then returned to the Federal Building where, according to Erdman, he visited Kahaner and accompanied the latter to Judge Rayfiel's chambers, which Kahaner entered, saying he would ask the judge's secretary to tell the judge that the Government would not oppose

withdrawal of the guilty plea and saying also he would tell Assistant United States Attorney Williams not to fight the withdrawal. This version was corroborated to some extent by Moore but was rather inconsistent with Becker's testimony that after this visit to Judge Rayfiel's chambers, Erdman said "Please don't make a motion to withdraw the pleas." Kahaner denied going to Judge Rayfiel's chambers or otherwise participating in the events of the morning of March 30; and Justice Keogh denied any participation save for then calling Judge Rayfiel for an appointment for Erdman, at the latter's request and in Becker's presence—this being the only call made by him to that end.

According to Erdman and Moore, there were several meetings of the defendants in April, in the course of which Kahaner, among other things, suggested that the situation might still be saved or at least ameliorated by an offer of restitution from Moore. Justice Keogh and Kahaner agreed that they lunched with Erdman on April 5, but testified this meeting had been arranged before the sentencing—a fact substantiated by Kahaner's telephone record—for the purpose of enlisting the Justice's aid in a project to have Kahaner continue for some time under the newly appointed United States Attorney, and that Moore's case was not discussed. The concededly disinterested testimony of Joseph Jaspan, the attorney for the trustee in bankruptcy of Gibraltor Amusements, Inc., provides a thread through the events of April and May. Jaspan was in Justice Keogh's court trying a case the latter part of April, saw Moore sitting there, and approached him during a recess. Moore said he was about to apply for a reduction

in sentence and was prepared to pay in restitution $50,000 in notes endorsed by Erdman; he asked whether if such payment was made, Jaspan or the trustee, M. Hallsted Christ, "would go to Judge Rayfiel and make a plea for him." After further discussion with Moore on April 27, Jaspan was back in Justice Keogh's court on this other matter early in May; the Justice called him to the side-bar and inquired as to "what was happening" in the Gibraltor case, saying that Erdman was his physician and friend. Later the Justice's office requested Jaspan to attend a meeting in chambers on May 22; upon arriving there, Jaspan found, in addition to the Justice, Moore and Erdman, whom the Justice introduced, and Louis Forman, a business associate of Moore's. The Justice inquired what was happening in regard to the proposed settlement in Moore's case. Jaspan answered that the trustee was prepared to recommend acceptance of $50,000 in notes endorsed by Erdman, but that he "had no way of knowing whether this would help them in the matter before Judge Rayfiel," and that the offer must not be conditioned on a reduction of sentence, with Justice Keogh also emphasizing this. On May 31, Moore, whose application for a stay pending petition for certiorari from our affirmance of Judge Rayfiel's order denying leave to withdraw his guilty plea, 290 F. 2d 501, had just been denied, delivered to Jaspan a check signed by Erdman for $1,000, and a series of notes, twenty-four for $1,000 and one for $25,000, made by Moore and endorsed by Erdman; he asked Jaspan to inform Judge Rayfiel of this. After an unsuccessful attempt to communicate with Williams, who, it was learned, had severed his connection with the United States Attorney's office, Jaspan called

Judge Rayfiel for an appointment; the Judge was willing to make one only if a representative of the United States Attorney was present, and suggested that Jaspan call Kahaner, the Chief Assistant. After being referred by Kahaner to Kreindler, the chief of the Criminal Division, without result, Jaspan again called Kahaner, who agreed to attend, and also Becker, who had prepared the offer of restitution. When the three lawyers appeared before Judge Rayfiel that afternoon, Becker said he intended to apply for a reduction of sentence because of the restitution and wished to know whether an oral application would be entertained; Judge Rayfiel said it would. Kahaner raised the point that a petition for certiorari to review this Court's affirmance of the adjudication in bankruptcy, *In re Gibraltor Amusements, Ltd.*, 291 F. 2d 22 (2 Cir.), cert. denied, 368 U. S. 925 (1961), was pending, and questioned whether the application for a reduction of sentence should be entertained unless the petition were withdrawn. The Judge said that the defendants should surrender on the following Monday, as scheduled, but indicated that he would then continue bail pending a hearing on the application for reduction of sentence.

To the framework afforded by Jaspan's evidence, Erdman and Moore annexed much testimony as to markedly greater interest and participation by Justice Keogh in the settlement negotiations. In particular they claimed he had reviewed a draft of the settlement offer and insisted on eliminating a condition as to reduction of sentence—but with a remark indicative of further conversations with Judge Rayfiel that would make this damaging to Keogh rather than the reverse. Justice Keogh, while conceding

that he had a discussion with Jaspan at side-bar and that a meeting was had in his chambers on May 22, denied participating in the meeting, making any remark about Judge Rayfiel or ever seeing the latter; to the extent that he conceded taking some interest in the settlement negotiations, he attributed this to his friendship with Erdman. Kahaner denied any participation save the telephone calls from Jaspan and his appearance before Judge Rayfiel on May 31. Corallo was not implicated in this phase of the alleged conspiracy.

The foregoing account, rather long as it has turned out to be, is skeletonized in the extreme and is intended only to afford the background needed for understanding the points raised on this appeal. Moreover, the summary leans in the Government's direction, since on appeal from a jury's verdict in a criminal case we must, in considering the evidence, take "the view most favorable to the Government", *Glasser* v. *United States*, 315 U. S. 60, 80 (1942). Thus our outline has not included much evidence adduced by defendants, which tended to discredit Erdman's and Moore's testimony in essential respects, although some of this will be mentioned below.

Every criminal case imposes special responsibilities on judges. These are enhanced when there is a sharp conflict in the evidence and the Government's case depends in large part on the testimony of persons who admit guilt of the crime with which the other defendants are charged. The responsibilities become greater still when the case threatens the deprivation of life or, as here, imperils much that makes life worth while—in one instance a reputation built over 37 years of public service and culminating in judicial office,

and in another a young lawyer's promising career. Yet we must say also that the offense here charged—an attempt to interfere with the administration of justice—strikes at the very foundation of government, and that the high position in the community held by one of the defendants, and the role of another as a federal prosecutor, would aggravate the offense—if it occurred. The institutional arrangement of power made by our Constitution leaves such awesome questions of guilt to be determined, not by trial or appellate judges, but by a jury of laymen, with the Government having the appropriately heavy burden of convincing twelve men or women of the guilt of each defendant beyond a reasonable doubt. If the evidence was sufficient to warrant submission to the jury, it is not for judges "to weigh the evidence or to determine the credibility of witnesses", *Glasser v. United States*, *supra*, 315 U. S. at 80; our task, once we find that condition satisfied, is the more limited one of determining whether errors prejudicial to the defendants occurred at the trial. Even the bare outline we have given shows that the evidence was sufficient so that a reasonable juror could be convinced of the guilt of each of the appellants beyond a reasonable doubt.[4] Both the prosecution's case and the defendants'

[4] The outline may not have shown this with respect to Corallo, who, on the Government's evidence, was an adviser, or perhaps a stimulator, and a temporary holder of, some of the funds. But there was ample evidence to raise a question for the jury whether he had joined in the conspiracy; if the jury so found, he was criminally responsible for the acts of the other conspirators and his own failure to perform more than a few overt acts would be immaterial. See Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 946, n. 108 (1959). Corallo did not take the stand.

had their strengths and their weaknesses; it was for the jury, under proper instructions, to decide between them. So we pass to the many claims of error pressed upon us.

We have considered all these with care; our opinion will confine itself to those we deem most significant. For convenience we shall divide the claims into three categories: (I) Those relating to matters which arose prior to the judge's charge; (II) those relating to the charge itself; and (III) those relating to matters occurring subsequent to the submission to the jury.

I. Matters Arising Prior to the Judge's Charge.

(1) *Alleged use of information obtained by unlawful search and seizure.* Counsel for Justice Keogh complain of the court's refusal to grant a hearing, under F. R. Crim. Proc. 41 (e), as to the Government's use of information from his personal telephone message books, allegedly obtained by an illegal search and seizure. The facts as to how the Government obtained access to these books were developed at a hearing outside the presence of the jury, when the Government sought to compel their production during presentation of its case and Keogh's trial counsel objected, apparently on the basis of the privilege against self-incrimination, and also, to some extent, through testimony later given by Justice Keogh. After this hearing the Government withdrew its request for production of the message books, but Keogh's trial counsel contended that the facts that had been developed showed that the Government's previous access to the books constituted an illegal search and seizure and thus required a further hearing to determine the information that had been obtained and

the use to which it had been put. The claim was that the Government had used the information to "refresh" Erdman's recollection so that his trial testimony as to the dates and times of his contacts with Keogh would tie in with messages recorded in Keogh's books, as his grand jury testimony in July and August, 1961, allegedly had not.

The Government answers that Keogh consented to the examination of the message books, both by giving advance permission and by never expressing any objection despite his knowledge that the examination had taken place.[5] Moreover, it argues that even if access had been illegally obtained, the motion for a hearing looking to suppression of the fruits of the search was untimely under F. R. Crim. Proc. 41(e), coming, as it did, in mid-trial and long after Keogh had learned that the "search" had been conducted. We find it unnecessary to pass on the latter contention, which would require us to consider, among other things, whether the requirement that "if such a claim is made after the trial is under way, the judge must * * * be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim," *Nardone v. United States*, 308 U. S. 338, 342 (1939), refers only to

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5 The Government's position is not inconsistent with its withdrawal of the request for production of the books, even if the latter was based on a belief that the evidence adduced at the hearing failed to establish a waiver by Keogh of his privilege against self-incrimination. For the evidence could well have been insufficient to show such a "binding pledge" to waive the privilege as would entitle the Government to require the defendant to *produce* papers that had remained in his possession, see 8 Wigmore, Evidence (McNaughton rev. 1961), § 2275, yet sufficient to show such consent to their *examination* as would negative an unlawful search. Quite evidently this was Judge Wegnfeld's view.

knowledge of the search and, if so, how complete the knowledge must be, or must include knowledge, that what the Government obtained by the search was to be put to a detrimental use. For the evidence here warranted the court's conclusion that no illegal search had occurred.

Two agents of the FBI, Maher and Gallagher, came by appointment to see Justice Keogh in the Kings County Supreme Court on the morning of September 15; he adjourned court and met them in a robing room adjacent to his courtroom on the 7th floor. Justice Keogh's attitude had been one of full cooperation with the Government's investigation; he had been interviewed by FBI agents and had made records of his bank accounts and his checkbooks available to them. Knowing that the FBI wished to interview his two clerks, Benjamin and Seigel, he had arranged for them to be waiting in the robing room. Then, in Keogh's words, "I told my two clerks that I thought it would be more comfortable if they went up to the eleventh floor chambers, * * * and told my clerks to give them [the FBI agents], to the best of their ability, any information they should like". Benjamin's version of Keogh's instruction was, "'Tell them everything they want to know and be cooperative with them' ", or, as he restated it, "'Go with these two gentlemen up to the 11th floor chambers and tell them anything they want to know' ". Agent Maher testified: "Judge Keogh told Mr. Seigel and Mr. Benjamin that we were going to interview them and that they—he wished that they would cooperate and furnish any information that we requested." After the agents had finished questioning Benjamin in the 11th floor chambers, they asked

if the judge kept any notes of his telephone messages. Benjamin showed them the telephone message books, whereupon "They took, I believe it was, the current book with the hard cover on it and skimmed through the pages". Keogh testified that later in the day one of the clerks "said the agents thumbed through them [the telephone message slips] and asked what the red checks meant, and that was all I heard about that". At no time during his frequent contacts with the Government in the ensuing weeks, during which he submitted to further interviews and testified before the grand jury, did Justice Keogh indicate objection to what had been done.

Judge Weinfeld was warranted in refusing to find in this the "forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods" condemned in *Boyd* v. *United States*, 116 U. S. 616, 630 (1886). True, the protection of the Fourth Amendment is not limited to cases where force is used, as *Gouled* v. *United States*, 255 U. S. 298 (1921), clearly shows. But here we have no case, such as was there presented, of "a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call" gaining access to a defendant's premises by subterfuge and making a "search and seizure subsequently and secretly * * * in his absence * * *." Here the representatives of the United States came openly and by appointment to get information which Justice Keogh, a former federal prosecutor well aware of his rights, indicated—not only by his words but by his prior and subsequent conduct—that he was entirely willing to give;

his consent was quite sufficient to include the telephone message books kept by the clerks. Although each of the many decisions in this area necessarily turns on its own facts, we find *Honig* v. *United States*, 208 F. 2d 916 (8 Cir. 1953); *United States* v. *Dornblut*, 261 F. 2d 949 (2 Cir. 1958); and *United States* v. *Martin*, 176 F. Supp. 262 (S. D. N. Y. 1959); sustaining the propriety of the agents' conduct, more nearly apposite than others, cited by counsel for Keogh, which held the alleged consent to be involuntary and the search unlawful. While the court was thus warranted in holding that the agents' checking of the telephone message books was not an unlawful search and that there was thus no basis for a separate hearing directed to the suppression of its fruits, this did not prevent Keogh's counsel from developing at the trial itself that the information obtained from the message books had been used to prompt Erdman; he could have called Maher and Gallagher, interrogated them as to what information they had obtained and what they had done with it, and then, on a suitable showing, had Erdman recalled for further cross-examination. We realize that, as a matter of trial tactics, this was a far less attractive course, very likely an altogether unattractive one; but it was all counsel was entitled to.

(2) *Newspaper headlines.* Judge Rayfiel testified on Friday, June 1, 1962, in regard to his luncheon with Justice Keogh on the day preceding the sentencing and to his seeing Dr. Erdman at Keogh's request on the next morning.[6] The Journal American for the afternoon of June 1 carried

[6] The core of Judge Rayfiel's direct testimony as to the luncheon conversation is set forth in footnote 10 *infra*.

a large-type banner headline "U. S. Judge accuses Keogh"; the World-Telegram had a four-column headline, "Judge Testifies Keogh Made Bid for Leniency." When the trial resumed on Monday, counsel for the defendants moved for a mistrial. The judge announced he would question the jurors separately in the presence of counsel. The questioning revealed that although all the jurors had followed the judge's instructions not to read newspaper articles about the case, eight jurors and three alternates had not been able to avoid seeing the headlines; they all asserted, however, that these had not affected their ability to decide the case solely on the evidence. The court denied the motion for a mistrial and also a request that Judge Rayfiel's testimony be read to the jury; but, as we shall see, this testimony was read to the jury at its request on the afternoon before it reached its verdict.

Whether Judge Rayfiel's direct testimony was that Justice Keogh himself had sought leniency for Moore or merely that he had passed on a friend's request—an issue we shall discuss further when we come to the charge—the World-Telegram's headline was within the range of fair characterization. The Journal American's was not; Judge Rayfiel had simply stated his recollection of the facts and had further said that he saw no impropriety "in anyone speaking in behalf of a man about to be sentenced." A misleading headline printed so large that conscientious jurors cannot help seeing it hardly bespeaks a proud and responsible press, whose constitutional freedom rises no higher than the criminal defendant's right to a fair trial. However, we find it quite impossible to believe that the jury, which had seen and heard Judge Rayfiel that after-

noon, which was to listen to so much exegesis of his testimony in the way of summations by counsel and instructions by the court, and which was finally to request a reading of that testimony, could have been so affected by an inflammatory verb in a newspaper headline, two weeks before its verdict, as to impeach the verdict's validity. Comparison of the facts here with the publicity relating to inadmissible prior offenses in *Marshall v. United States*, 360 U. S. 310 (1959), or the "build-up of prejudice" in *Irvin v. Dowd*, 366 U. S. 717, 725 (1961), shows the inapplicability of these cases, and of the salutary principle for for which they stand.

(3) *Admission of evidence of gifts and loans from Erdman to Justice Keogh.* The Government was allowed to prove that Erdman had made gifts to Justice Keogh of a car in 1959 and of storm windows, had lent him $2500 in 1960, had made him a further loan of $1000 on June 28, 1961, when, as Erdman testified, Keogh "said he was going to Great Barrington and that he needed some more money," and, on July 14, 1961, had sent him a further check for $500, Erdman testifying that Justice Keogh had solicited this in terms rather similar to the previous loan, whereas Keogh had testified before the grand jury that it was unsolicited. The judge admitted this evidence "solely for the purpose of showing the relationship and association between the defendant Keogh and Erdman"; he reiterated this limitation during the trial and in his charge, adding "There is no claim that the loans were payments in furtherance of the conspiracy" and that "in no respect may the testimony as to the loans or gifts or any exhibits relating

thereto be considered as proof of the conspiracy here charged." Counsel for Keogh urge the admission of the evidence was error, claiming that the danger of the jury's viewing the gifts and loans as evidence of other corrupt endeavors outweighed any probative value the material had as showing a friendship between Justice Keogh and Dr. Erdman, which the defense had conceded.

There can hardly be doubt that the evidence passed the basic test of relevancy: "the evidentiary fact offered does not need to have strong, full, superlative, probative value, *does not need to involve demonstration* or to produce persuasion by its sole and intrinsic force, but merely to be *worth consideration by the jury*." 1 Wigmore, Evidence (3d ed. 1940), 417. A jury could well believe the type of relationship which these transactions tended to establish was far more likely to produce, or to have produced, an attitude of mind in which Keogh might suggest a financial reward for an intercession with Judge Rayfiel than a relation between doctor and patient that had developed into a close friendship. Moreover, characterization of these incidents by the general phrase "gifts and loans" considerably understates their significance. Erdman's reference to the 1959 car was a part of his statement that, on their first discussion of the *Moore* case, Keogh said "that the car I got him in 1959 was a little old and that he could use a new car"; the storm windows and the 1960 loans related to the Justice's summer home at Great Barrington, further requirements for which were listed on the card which Erdman claimed was given to him at the same meeting; the statements of financial need allegedly made in June and July, 1961, tended to show that Keogh needed money

for the Great Barrington project and otherwise and thus to support Erdman's story as to the corrupt transactions; and the phrase "some *more* money" in Erdman's description of the June loan, was part of a conversation where the possibility of Moore's seeking a refund was also allegedly discussed. The court's restriction on the purpose for which the jury might consider the evidence, although doubtless wise, thus operated to defendants' advantage.

We see no warrant for counsel's fear that the jury was likely to take this evidence as proving generally bad character or previous corrupt efforts to influence the administration of justice. The Government made no such suggestion, and the court expressly narrowed the purpose for which the evidence could be considered. However, if in fact the evidence was susceptible of such use despite the limiting instruction, its admission would still not call for reversal since "the inadmissibility of an evidential fact for one purpose does not prevent its admissibility for any other purpose otherwise proper." 1 Wigmore, *supra*, at 711. Even if the evidence had been far more liable to improper use than it was, "As we have so often held, evidence relevant to the proof of one crime is not incompetent because it discloses the commission of another." *United States* v. *Eury*, 268 F. 2d 517, 520 (2 Cir. 1959), citing many cases. True, the trial judge should, in an exercise of sound discretion, exclude evidence tending to show the commission of other crimes "where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State* v. *Goebel*, 36 Wash. 2d 367, 218 P. 2d 300, 306, cited in McCormick, Evidence (1954), 333, fn. 28; cf. *Grunewald* v. *United States*, 353 U. S. 391

424-425 (1957). But the judge's conclusion that the relevance of this evidence outweighed any tendency to undue prejudice, with the cautionary instruction he repeatedly gave, was in no manner an abuse of discretion; indeed, we think exclusion of the evidence would have been wrong.[7]

(4) *Exclusion of evidence of practice of other Eastern District judges to receive presentence information.* Objection is made to the court's refusal to allow Justice Keogh to testify whether during the period when he was United States Attorney for the Eastern District in 1945-1949, "there [was] an accepted practice by * * * every federal judge in Brooklyn, to receive information from sources other than the presentence report on the family status and background of persons about to be sentenced"; he was permitted to testify "it was Judge Rayfiel's practice to try to obtain other than through the Probation Department any information that might come from clergymen, relatives, friends, so that he could evaluate the entire panorama of the background of the particular person to be sentenced." Judge Rayfiel had previously stated that "within the limits of the time that was available I would talk with any person who had anything to say in behalf of a person about to be sentenced." There was no challenge to the defendant's point

[7] *People v. Mullens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944), heavily relied on by counsel for Keogh, is distinguishable on the ground, stated in the opinion, that "Solomon's habit so to make use of Bitterman's name had already been demonstrated and was undisputed"; hence the evidence showed a "remote and merely cumulative fact" rather clearly pointing to criminal conduct, and its admission was an abuse of discretion. Here, even assuming the evidence to have been as prejudicial as that in *Mullens*, which we doubt, it was markedly more probative in its relevant aspect.

that Justice Keogh was warranted in believing he might properly discuss Moore's sentence with Judge Rayfiel, although, on his own testimony, the aid he could afford was scanty—if his motivation was solely what he claimed it to be. It is thus hard to see the relevancy of evidence showing that, as a result of his experience as United States Attorney a dozen years before, he would have felt equally warranted in having a similar discussion with other judges who at that time had been on the bench of the Eastern District along with Judge Rayfiel, then the junior judge: "[L]egal relevancy denotes, first of all, *something more than a minimum of probative value*. Each single piece of evidence must have a plus value." 1 Wigmore, *supra*, at 409-10. The court did not err in concluding that the proffered evidence did not meet this standard—particularly in view of the areas that might have had to be opened for rebuttal by the Government if the evidence had been admitted. Trial judges have wide discretion to exclude for remoteness. *Duvall* v. *Buden*, 124 Conn. 43, 198 Atl. 275 (1938); McCormick, *supra*, at 320.

(5) *Cross-examination of Kahaner with respect to his brokerage accounts.* Kahaner complains of the cross-examination with respect to stock transactions set forth in the margin.[8] On the redirect which followed immediately, he

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[8] "Q. Mr. Kahaner, did you purchase any stock in the year 1961? A. Yes.

Q. Isn't it a fact that you purchased $95,000 worth of stock? A. I have no idea of the amount, Mr. Hundley. I use an investment adviser who trades in my account as he sees fit. He buys and sells. If you mean a total of $95,000?

Q. Yes. A. I would say I bought stocks and sold stocks, some of which was replaced. I don't know the total amount.

testified that he had never purchased any stock with cash or made any large cash deposits in brokerage or other accounts. It was later stipulated that the only money deposited in his brokerage accounts in 1961 was $200 by check on January 28; hence the large figure in the prosecutor's questions could only have represented purchases made with proceeds from the sale of securities already owned. The contention is that the prosecutor knew this when he asked the questions we have quoted. If this be so, and the Government's brief does not deny it, we must regard this cross-examination as a blemish on what seems otherwise to have been an entirely fair, although properly vigorous, presentation of the Government's case. But the court stopped the inquiry at an early stage, Kalmbach largely set matters right only a few moments later, the stipulation finished the job, and no further reference to the matter was made. Under these circumstances, we cannot consider that

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Q. Would you deny that it was $95,000?

Mr. Kleinman: Objection, your Honor.

The Court: I will allow him to answer.

Q. I will take any explanation you want to give. A. My accounts were at Merrill Lynch and Eastman, Dillon and whatever the accounts reveal are what is in there, Mr. Hundley.

Q. Would it be fair to say that you had $95,000 worth of stock in 1961? A. I may have.

Mr. Kleinman: I must object to this. We don't know when it starts, the first purchase, how long he had it or anything else.

The Court: Yes. If you want to go into this, I think you have to lay a proper foundation. I don't think there is any point in culling one particular figure out and using that. It may distort the true picture.

If you want to develop the evidence on a permissible legal theory, I will allow it.

Mr. Hundley: I have no further questions your Honor."

the prosecutor's questions, unfair though we deem them to have been, created such prejudice as to call for reversal."

(6) *Failure to furnish Jencks Act statements of witnesses against Kahaner.* Rose Kippe, secretary to the Chief Assistant United States Attorney, was called by the Government solely to identify and explain the record she kept of incoming telephone calls that Kahaner had been unable to take; later she appeared as a witness for Kahaner and gave important testimony on his behalf. Complaint is made that, despite a pre-trial agreement that all witnesses' statements subject to production by the Government under 18 U. S. C. § 3500 would be given to defense counsel without the need of request, such a statement of Mrs. Kippe's was not produced until she appeared as a defense witness, when the Government had it marked for identification and made some slight use of it on cross-examination. We have examined the statement; it is in full accord with the very limited testimony given by Mrs. Kippe as a witness for the Government, which was not disputed by anyone. Kahaner's brief also complained of the Government's failure to furnish any statements by Rose St. George, an employee of the United States Attorney's office, and Dr. Fred Miller, an FBI document expert who testified on rebuttal as to certain obliterations in Kahaner's diary; it asked that the Government tell us whether any such statements exist. The Government has advised that there was a report by Dr. Miller made to the FBI on June 7, 1962, the day preceding his testimony; we have read it and find it to be simply a summary of the findings to which Dr. Miller testified. These objections thus fail under the

harmless error rule, 28 U. S. C. § 2111. *Rosenberg* v. *United States*, 360 U. S. 367 (1959).

(7) *Use of Moore's grand jury testimony with respect to Corallo.* The case against Corallo rested wholly on the testimony of Erdman and Moore. Both had implicated Corallo in their grand jury testimony, and Erdman did so at the trial. However, on the Government's first question to Moore at the trial which involved Corallo's knowledge of the proposed corrupt endeavor, he answered "I didn't tell Corallo what this $10,000 was for." Government efforts to refresh Moore's recollection on this and other questions by reference to his grand jury testimony proved largely unsuccessful. He completely exculpated Corallo on cross-examination by the latter's counsel. Thereupon the prosecutor sought permission to examine Moore on his grand jury testimony, stating that he was surprised by Moore's trial testimony since it was substantially different from what Moore had told the grand jury and Moore had given assurances that the grand jury version was the truth. After an over-night adjournment, the court found that with respect to four specific matters the Government's claim of surprise was justified and ruled that, under the authority of *United States* v. *Di Carlo*, 6 F. 2d 364, 367-68 (2 Cir.), cert. denied, 268 U. S. 706 (1925); *United States* v. *Allied Stevedoring Corp.*, 241 F. 2d 925 (2 Cir.), cert. denied, 353 U. S. 984 (1957); and *United States* v. *Murray*, 297 F. 2d 812 (2 Cir.), cert. denied, 369 U. S. 828 (1962), the Government would be allowed, if a further attempt to refresh Moore's recollection failed, "to question the witness as to whether he had not been asked certain questions and give [n]

certain answers thereto as shown by the grand jury testimony on this subject." The court instructed the jury that evidence so taken was to be considered only against Corallo, and also that "To the extent that any evidence was elicited from this witness of his prior testimony before the grand jury, that is not to be treated as affirmative proof of the fact," but "together with his current trial testimony, only goes to the issue of his credibility on these matters."

Counsel for Corallo argues that the prosecutor was not in fact surprised and that, despite the judge's instruction, the jury really was asked to accept Moore's grand jury testimony rather than what he said at the trial. As to the first point, the showing of surprise met the rather modest requirement of such cases as *United States* v. *Graham*, 102 F. 2d 436, 442 (2 Cir.), cert. denied, 307 U. S. 643 (1939); *Ellis* v. *United States*, 138 F. 2d 612, 616 (8 Cir. 1943); *Weaver* v. *United States*, 216 F. 2d 23 (9 Cir. 1954); and *Stevens* v. *United States*, 256 F. 2d 619, 622-23 (9 Cir. 1958). On the second point, the court conformed to the judicially sanctioned ritual; whether the time may not have come to recognize the realism of Corallo's analysis, but to answer it by the franker and bolder approach apparently advocated in Judge Learned Hand's pioneering opinion in *Di Carlo*, *supra*, 6 F. 2d at 368; see McCormick, *supra*, § 39; 3 Wigmore, *supra*, § 1018, note 2; Morgan, Hearsay Dangers, 62 Harv. L. Rev. 177, 192-96 (1948); cf. *Bridges* v. *Wixon*, 326 U. S. 135, 150-55 (1945), we leave for another day.

II—Criticisms of the Judge's Charge.

The criticisms of the charge are somewhat more serious. Almost all relate to the judge's handling of the facts. We find but two significant criticisms that relate to the law; and even in those cases, as our discussion will show, the error alleged is not in the statement of the law as such but in its relation to the evidence here.

A.

(1) Kahaner criticizes a portion of the charge where, after stating that it would not be unlawful for Justice Keogh to have spoken to Judge Rayfiel about Moore for disinterested reasons but that it would be if he had received cash from Erdman on behalf of Moore, the judge made the remarks quoted in the margin.[9] The criticism is that there was no evidence that Kahaner had ever "used his position as Williams' superior * * * to obtain suspended sentences for those indicted," and also that, although there

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9 "Similarly, it is not illegal to speak, or agree to speak, to a United States Attorney or any assistant in charge of a prosecution about its status. Thus, the conversation between Kahaner and Williams the assistant United States attorney, who was in charge of the Moore case, is not, in and of itself, proof that Kahaner was a member of a conspiracy corruptly to obstruct justice, as charged in the indictment.

"But if you find that Kahaner used his position as Williams' superior in an endeavor to have fewer persons indicted than those contemplated by Williams or to obtain suspended sentences for those indicted in consideration of cash, paid or to be paid to him under an agreement or arrangement with Erdman, then you have sufficient to find that that endeavor was corrupt and, further, that he was a member of the conspiracy here charged, provided you also find all the other essential elements thereof are established."

was evidence that Kahaner had made some inquiry in January whether Williams would be satisfied to indict two rather than three, there was no evidence that Kahaner had any arrangement with Erdman at the time for a cash consideration. The first criticism seems well taken; it may or may not be a sufficient answer to the second that the jury could have drawn an inference that Kahaner had already formulated an idea of seeking to obtain money from the prospective defendants in the bankruptcy case and thought that success in reducing the number to be indicted would enhance the interest of those who were. What is a sufficient answer to both criticisms is that no exception was taken, as required by F. R. Crim. Proc. 30, and that the error was a long way from being so prejudicial as to attract the rule, F. R. Crim. Proc. 52(b), entitling us to notice "Plain errors or defects affecting substantial rights * * * although they were not brought to the attention of the court." Right after the remarks quoted in the margin the judge said that "if you should find that no cash payment was made to Keogh or Kahaner * * * there would be no basis for a finding of corrupt endeavor," and went on to say, "All counsel agree that the central and basic issue in the case is whether the money was paid over to Keogh and Kahaner"—a point which the summations had made abundantly clear. It is quite inconceivable that this jury, whose attention and intelligence are demonstrated so tellingly by the highly pertinent requests for evidence made during its deliberations, convicted Kahaner on the basis of his talk with the Assistant United States Attorney before any money was claimed to have been promised.

(2) Another criticism relates to the so-called restitution phase of the conspiracy. The Government's theory, a permissible one under the indictment and the law, was that after the debacle on March 30, the conspiracy continued—with the proposed restitution, an idea allegedly initiated by Kahaner and forwarded by Justice Keogh, simply another means to achieve the same end of reduced punishment. The defendants say it was wrong to let the jury consider this at all since there was no evidence of any corrupt endeavor to influence anyone during this period. Even if we should limit ourselves to Jaspan's testimony, that would hardly be true; if Jaspan was being utilized by the defendants in pursuit of their corrupt endeavor, *non constat* that he knew nothing of the payments and was acting entirely lawfully and in complete good faith. "[I]t is well settled that acts which are themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 707 (1962). Moreover, the claim ignores Moore's testimony as to the remark allegedly made by Justice Keogh in relation to Judge Rayfiel to which we have previously referred. The defendants also claim the charge on the restitution phase was erroneous. The court said that the jury must first determine whether the conspiracy ended on March 30; that if it so found, then, in deciding whether a defendant had been a member of the conspiracy, it must exclude all evidence of the restitution plan other than admissions of the particular defendant; but that if it found that the conspiracy continued beyond March 30 to the end of May, it might consider acts or

declarations of all co-conspirators during that period in furtherance of the conspiracy's objectives. This seems entirely right.

B.

Appellants rely more heavily on their criticisms, both general and specific, of the judge's treatment of the evidence. The general criticisms, that the judge spent more time in stating the Government's than the defendants' case and that he ignored points developed by the defense on cross-examination and inconsistencies among the Government's witnesses, are rather plainly lacking in merit. The general plan of this portion of the charge was to state first the Government's case and then the defendants' contentions. This is a traditional method of presentation and one rather helpful to the jury since it generally follows the order in which the evidence has been heard, although it almost necessarily involves giving more time to the prosecution's case than the defense, which, in the nature of things, often must take the form of a denial. We cannot believe juries are misled by this method of commenting on the evidence, any more than they are by the fact that more time is usually devoted at the trial to hearing the evidence of the prosecution than of the defense, which sometimes offers none at all. Moreover, doubtless in an effort to prevent any possible unfairness from this organization of the charge, the judge repeatedly interrupted the statement of the Government's case to include at least a portion of the defense's answer. And at the very beginning of his summary of the defendants' contentions, he emphasized that defendants "point to the inconsistencies

and contradictions contained in the testimony of government witnesses and the contradiction of their testimony by other government witnesses."

It is convenient, despite some overlapping, to divide the specific attacks into three categories: (1) Failure adequately to charge a theory of defense; (2) misstatements of the evidence; and (3) failure adequately to present defendants' answers to various claims of the Government.

(1) Counsel for Kahaner did not question that Moore had paid $35,000 to Erdman in aid of a corrupt endeavor to influence the administration of justice. His theory, which was joined generally by the other defendants save that counsel for Keogh also questioned whether the money ever had been raised, was that Erdman intended from the outset to pocket the money, did exactly that, and then, when his iniquity was discovered, decided to implicate Kahaner, Keogh and Corallo in an effort to gain favor with the Government, with Moore joining in the endeavor for the same reason. More specifically, the theory was that Erdman's cupidity had been aroused when he learned the prospective defendants were thinking of engaging a well-known Washington, D. C., lawyer for $60,000 plus an estimated $10,000 for disbursements; that, after first suggesting that a New York lawyer could be retained for half that amount, he had the happy thought of getting this money for himself by promising to bring about the desired result through corrupt means; that he pressured Moore down the primrose path; and that he then lulled Moore and the other defendants in the bankruptcy case into a false sense of security by talk of arrangements with Kahaner and later of assistance from Justice Keogh which

existed almost exclusively in Erdman's mind and on his tongue. Defendants claim this theory received substantial support from one of the wholly disinterested witnesses, M. Hallsted Christ, the trustee in bankruptcy of Gibraltor. Christ had called Erdman shortly before July 13 to say that the first of Moore's $1000 notes had been returned for lack of funds and to ask Erdman to make good; Erdman said he had already sent a check to Jaspan. Christ went on: "In the course of my conversation with Dr. Erdman, he indicated that he had security of $35,000 and asked me whether I could get any leads on assets of Mr. Moore that would bring him an additional $15,000 and he indicated that he had a firm of attorneys working to obtain that additional $15,000." Under date of July 13, Erdman wrote Christ a letter which began:

> "Sorry to have caused you any inconvenience. Mr. Moore apparently now feels that his case is unreasonable and he apparently does not plan to pay his notes. I am security for the first $35,000.00 and certainly would appreciate it if further security for the $15,000.00 could be obtained. Any information you have regarding this would be appreciated."

Interpreting the letter in the light of Christ's testimony as to the telephone call and other undisputed facts, it seems entirely clear, despite the Government's contention to the contrary, that, as indeed Erdman admitted on cross-examination, he meant "I am secured for the first $35,000"—a highly significant figure on defendants' theory. When taxed with this, Erdman said his statement as to security related to $35,000 in Ace Manufacturing Co.—an explanation which was attacked by Keogh's counsel in summation, which the

Government does not attempt to elucidate in its brief, and which we do not understand. After the charge had been concluded, Kahaner's counsel—admitting "I overlooked it completely in my request"—asked the judge "to charge the jury with respect to the testimony of Mr. Christ and * * * the letter of July 13th, that it is part of the defendant Kahaner's theory that Erdman got the money and keep [sic] it." After noting that counsel had argued the point to the jury in his summation, the judge declined.

As was held in *United States* v. *Strassman*, 241 F. 2d 784 (2 Cir. 1957), such an oral request made after the conclusion of the charge was too late under F. R. Crim. Proc. 30—a rule grounded both on the danger of error inherent in the necessarily rapid consideration of an oral request at such a time and on the possibly undue impact of a separate charge devoted to a single fact or theory. Still we might well invoke the "plain error" provision of Rule 52(b) if such a basic theory of defense as that Erdman intended to and did keep the money, had in no way been put before the jury. But that was not at all the case. The theory had been extensively argued in the opening on behalf of Keogh, and in the summation of Kahaner's counsel which also included the support allegedly afforded by Christ's testimony and Erdman's letter. Moreover the charge itself told the jury, in a passage previously quoted, that the one thing on which all counsel agreed was that the jury could not find Keogh or Kahaner guilty unless it found that the money was paid to them; after all it had heard, the jury scarcely needed to be told explicitly in the charge that the money could not have been paid to Kahaner and Keogh if Erdman had kept it.

(2) Judge Weinfeld described the meeting at which the $35,000 plan was first put by Erdman before Moore, Deutsch and Cohen in the manner set forth in the margin.[10] The defendants level two attacks at this:

The first concerns the dates assigned to the telephone call from Kahaner to Erdman and Erdman's meeting with Moore, Deutsch and Cohen. At one point in his direct examination Moore gave the date of the delivery of the first $5,000 to Erdman, which, of course, was subsequent to the meeting, as "the 10th of February—yes, about the 12th or 13th of February." Under cross-examination by Kahaner's counsel, Moore said repeatedly that the meeting at which Erdman first asked for money was on February 10 or "a day either way; the 10th or 11th." The importance of this was that Kahaner concededly was on a vacation in the Caribbean from February 2 to 13; hence, if the meeting was on February 10 or 11, Kahaner could not have called Erdman shortly before it as Erdman claimed. Kahaner's counsel took proper exception to the judge's failure to call the jury's attention to Moore's testimony as to the date.

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10 "Thereafter, according to Erdman, past the second week of February, Kahaner called him and said three of those arrested would be indicted; three would not, and that he would see that the indicted three would be treated softly by having the case brought before an agreeable judge in April, for which he wanted $35,000; and thereafter, just past February 14th, about the 15th or 16th, Erdman conveyed Kahaner's request and information to Deutsch, Cohen and Moore.

"In addition to Erdman, Moore, Deutsch and Cohen, the other alleged participants in the conference, testified; and while there are differences as to some matters which were discussed, they appear to be in accord that Kahaner's proposal for a payment to him of $35,000 was submitted by Erdman at that meeting."

Although it would have been better if the judge had done so, we do not find his refusal to modify his charge to have been prejudicial. The charge itself was accurate; Erdman had fixed the call from Kahaner as "past the second week of February." Moreover, Moore himself on direct examination had first described the meeting as being "About the middle of February", and during his cross-examination, even before Kahaner's counsel had gotten him thoroughly committed to February 10 or 11 as the date of the meeting, Moore had altered the date of the delivery of the money from February 10, as he had testified on the previous day, to February 20—a date consistent with Erdman's fixing the telephone call at a date after Kahaner's return. Deutsch and Cohen also placed the meeting during the week of February 12. More important, the point as to the date had been developed by Kahaner's counsel on summation with such skill and vigor that it must have been deeply impressed on the jury's mind—an impression that ought to have been reinforced by the judge's saying, in his summary of Kahaner's defense, "that shortly thereafter [i.e., after his talk with Williams] he left for a holiday and did not return to the United States until February 14th." This issue was of the sort the judge may have had in mind when he emphasized in his additional charge, given after taking the exceptions, "that counsel, during the course of their summations, referred to various matters which they stressed and believed were important and to which I did not refer, and, of course, you will bear these matters in mind."

The other attack concerns the judge's statement that the four participants in the meeting, although differing as to some matters, "appear to be in accord that Kahaner's

proposal for a payment to him of $35,000 was submitted by Erdman at that meeting." This was not correct. The four participants were in accord that a $35,000 payment was proposed, and Erdman and Moore were in accord that Erdman had characterized the proposal as coming from Kahaner and as being for a payment to him. But Deutsch testified only that "Dr. Erdman told Mr. Moore that he thought he could do something for him, that it would cost $35,000. And he said he is doing it for my cousin, that was the only reason that he had gotten involved." Cohen said on direct examination "At that time Dr. Erdman told him [Moore] that $35,000 would take care of it"; under cross-examination he elaborated that he believed at the time that the $35,000 was going to a lawyer for his fee.

Analyzing the record from our vantage point, the variance can be deemed quite significant. Throughout the trial no witness save Erdman and Moore testified that Kahaner ever sought a payment or that any payment was made; corroboration of Erdman's mention of a Kahaner proposal for a payment, even from co-conspirators such as Deutsch and Cohen, would thus be important, and their failure to recount this even more so. We find no indication, however, that any such significance was attributed to the judge's slip by anyone at the trial. No exception was taken by defense counsel; had it been, the judge would doubtless have given a corrective instruction as he did on another matter, where no actual error had occurred. This absence of exception is important, not merely from the standpoint of compliance with F. R. Crim. Proc. 30 and the necessity, on which the Rule rests, for avoiding retrials on grounds not called to the judge's attention, but for another reason we find equally

pertinent here. If the judge's inadvertent error did not attract the attention of any of the alert and capable counsel representing these defendants, it is fanciful to think that this single sentence in a charge of more than sixty printed pages so impressed the jury as to have influenced their decision—and to have done this despite the judge's admonition, made more emphatic by repetition in his additional charge, that "if any reference by me does not accord with your recollection, you will disregard entirely what I have said and be guided by your own independent recollection." Appellants say the latter instruction is a mere formal incantation with which jurors cannot possibly comply in a trial of this length. So it might be if the judge had delivered the kind of invective described in *Quercia v. United States*, 289 U. S. 466 (1933), which appellants cite to us, or even if he had mistakenly stressed that Deutsch and Cohen had corroborated Erdman and Moore in this important particular. But where nothing of the sort occurred, it is as least an equal defiance of reality to suppose that this mistaken reference, which did not attract an objection from attentive counsel, lingered in the jury's mind.

(3) Appellants' many other criticisms relate to alleged inaccuracy in the sense not of misstatements[11] but of claimed failure to convey the full thrust of their evidence. We shall deal specifically only with the two most important; for the rest we must be content with some general observations, which are also pertinent to the particular criticisms

11. They would regard their point relating to Judge Kaufman's testimony as being a misstatement, but we would not for reasons developed below.

about to be discussed and, in some measure, to those that have been.

It is quite impracticable for a trial judge, summarizing a case to a jury, to develop each piece of evidence offered in support of an indictment, each item offered in rebuttal, and each opposing inference sought to be drawn. An appellate court reviewing such a summary not only must consider it as a whole but must place it in the setting created by the jury's hearing of the evidence and the summations of counsel. Many of appellants' contentions on this phase of the case read as if Judge Weinfeld alone had heard the witnesses and the summations, with the jury receiving nothing but the charge. Although on such a hypothesis the summary here would not have adequately conveyed the case of either side, nothing follows from that; if the judge had thought the jury was solely dependent on his summary, he would surely have made a quite different one. True, "The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him;" *Burke* v. *Maxwell*, 81 Pa. 139, 153, quoted with approval in *Starr* v. *United States*, 153 U.S. 614, 626 (1894); but if this were pressed to the extent of requiring the inclusion of every thrust and counterthrust, the judge would be taking over the province of the witnesses and of counsel. Judge Weinfeld was at pains to make it clear he essayed no such role, as the remarks already quoted show.[12] Moreover, although our discussion

12 While a federal judge is privileged to "sum up the facts to the jury" if these are clearly left subject to its determination, *Starr* v. *United States*, *supra*, 153 U. S. at 624-25, he is not required to do so. Whether or not he should, rests "in his discretion," *ibid.*; it "is within his province, whenever he thinks it

is necessarily focused on the claims of the defendants as to the judge's failure to bring out evidence and inferences favorable to them, it is fair to note that he likewise made no reference to items strongly relied on by the Government.[13]

(a) One of the critical elements in the case against Kahaner was his alleged meeting with Erdman and Moore at a coffee shop near the Federal Building in Brooklyn on the morning of March 29, when he is claimed to have received the final $2500. The judge earlier instructed that, in contrast to most of the overt acts charged in the indictment, the Government was required to establish this date with precision. In the portion of his charge concerning the Government's case the judge summarized Erdman's testimony that he had arranged the meeting on March 28,

necessary." *Guercio v. United States, supra*, 289 U. S. at 469. Although we would not wish to press any thoughts on this subject against the views of experienced trial judges, it may not be amiss to query whether trial judges in this circuit address themselves to this preliminary question as regularly as might be wise. Thus, without remotely suggesting that it could be deemed error for the judge here to have summarized the evidence—or even that it would have been if objection had been made—we cannot but wonder whether, in a case like this, with a single-count indictment and after three days of pointed but fair summations by capable counsel, much was accomplished through another, and necessarily more compressed, summary by the judge.

13 One such item, which we cite simply by way of illustration, is the contrast, heavily stressed in the prosecutor's summation, between Justice Keogh's first F.B.I. statement that Erdman came along to his chambers on March 29 and his later statements that Erdman came with Moore and a man introduced as Forman, and his justification of the change on the basis simply of having consulted his diary entry "12:30 I.R.—Santord Moore."

stated "So, too, the Government emphasizes that Kahaner's message diary, Kahaner Exhibit T, contains an entry on March 28th, 'Dr. Erdman called; call him,' but he doesn't recall if he returned the call," recounted Erdman's and Moore's version of the encounter with Kahaner, and went on "You will here too recognize that not only does Kahaner deny this but swore that on the morning of March 29th he conferred with Judge Harry Frank at the Supreme Court, Manhattan, and did not return to his office until about 10:10 or 10:15." Later, in summarizing Kahaner's defense, he made the statement quoted in the margin.[14] On counsel's oral request after the charge, the judge, again referring to Kahaner's claim to having been in Judge Frank's chambers on the morning of March 29, added "While Kahaner has testified and also offered other evidence in support of his alibi, this does not relieve the government of its burden upon the whole case of establishing beyond a reasonable doubt that on the morning of March 29th,

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14 "As to March 29th, when both Erdman and Moore swore the $2,500 was given to Kahaner, he gives the lie to them. He swears that on that morning he conferred with Judge Frank, then sitting in the New York County Supreme Court, just across the street from this courthouse; that he was there from 9:30 or 9:40 to about 10:00 o'clock; that although the sign-in book that is in his own office has him entered at 10 o'clock, actually he got to his office at about 10:10 or 10:15 a. m.

"In support, he offers the testimony of Mrs. Kippe that she tried to locate him that morning at Judge Frank's chambers because word had been received that he was to be sworn in as United States Attorney pending official nomination of the new United States Attorney.

"Judge Frank, called by the Government, had no independent recollection as to whether he saw Kahaner and talked with him on March 28th or March 29th. He did recall, however, that whenever it was that Kahaner came to his chambers, it was sometime between 9:30 and 10 o'clock."

Moore handed Kahaner, in Erdman's presence, $2,500 in the coffee shop in Brooklyn."

Counsel for Kahaner urges that the judge's endeavor to make a fair statement of the evidence on this important phase of the case failed in various respects. These are (i) that although the statement as to Justice Frank's lack of independent recollection of the date was literally correct, a fair reading of the testimony shows he believed the meeting occurred on the 29th rather than the 28th; (ii) that Kahaner's appointment book for March 29 shows at the top "Rm 557—Judge Frank";[15] (iii) that Mrs. Kippe testified she had seen this entry on the morning of March 29 when endeavoring to locate Kahaner; and (iv) that Kahaner's telephone message book, kept by Mrs. Kippe to record calls during his absence, showed a call from Dr. Erdman at 9:30 A.M. on March 29, this corresponding to the time when Erdman claimed he was with Moore and Kahaner in the Brooklyn coffee shop, and when Moore, whose testimony was in conflict with Erdman's on this point, claimed that Erdman was calling Kahaner in Moore's presence, speaking to him, and arranging the meeting for later that morning. Only the last of these omissions was made the subject of exception.

All these items were excellent points for argument on Kahaner's behalf; they were excellently argued by his counsel. But, as we have said, if the judge's summary of the evidence is to be a summary, it has to stop somewhere. While Judge Weinfeld's summary did omit some evidence favorable to Kahaner on this issue, it also omitted the

15 Room 557 was the room in the New York County Supreme Court building which Justice Frank was occupying.

Government's *ripostes*—Kahaner's signing out on the mornings of *both* March 28 *and* March 29 for "Official Business, Supreme Court"; his failure to call witnesses to corroborate his explanation that on March 28 he had in fact been with Internal Revenue agents and in the Surrogate's Court; the absence of any record of the call from Chief Judge Bruchhausen's office on the morning of March 29 which was claimed to have led to Mrs. Kippe's efforts to locate Kahaner; the testimony of the Government's expert witness that the entry with respect to the March 29 appointment with Justice Frank was written with two different instruments; and the contention that even if Kahaner's appointment with Justice Frank was on March 29, there was still time for him to meet Erdman and Moore before arriving in the Federal Building around 10:15 A.M. Had the judge mentioned these answers of the Government, it would doubtless be contended that Kahaner's replications should likewise have been stated. This episode illustrates that, as we have said, the judge's summary cannot be expected to perform the office of the witnesses and of counsel, and his omission to state a piece of evidence cannot be transmuted into an implied direction to the jury not to consider it when his express direction was the opposite. This is what lies behind the statement in *Allis* v. *United States*, 155 U. S. 117, 124 (1894), "we know of no rule that compels a court to recapitulate all the items of the evidence, even all bearing upon a single question."

(b) Counsel for Keogh criticize the summary of Judge Rayfiel's testimony. In outlining the Government's case, Judge Weinfeld said:

> "Judge Rayfiel testified that Keogh mentioned the Moore case; that Keogh said a good friend had talked to him on behalf of Moore; that his friend informed him Moore was a fine fellow and 'wondered whether leniency could be extended to him.'"

When he came to Justice Keogh's defense, he stated:

> "Contrary to Judge Rayfiel's testimony, he states that he did then mention Erdman's name as the friend of Moore on whose behalf he was speaking. Keogh also denies Judge Rayfiel's testimony on direct examination that he asked that leniency be extended to Moore. He testified that he made no suggestion as to the sentence to be imposed on Moore, and Judge Rayfiel, under cross-examination, testified to like effect."

It is contended that this cast Judge Rayfiel in an unfavorable light by making out that he first testified that Justice Keogh himself had sought leniency for Moore and then changed his testimony on cross-examination for Keogh's benefit, and that it placed Justice Keogh in the position of contradicting Judge Rayfiel's direct testimony; in fact, it is claimed, Judge Rayfiel had testified both on direct and on cross-examination that Keogh was simply transmitting a friend's request. This is said to be particularly serious in view of the episode of the newspaper headlines discussed above. Although the interpretation of Judge Rayfiel's direct testimony[16] is debatable, looking

16. "He told me that a good friend had spoken to him about Moore, told him that he, Sanford Moore was to appear before me the following day for sentence. And that his friend informed him that Moore was a very fine fellow and wondered whether leniency could be extended to him."

only at the cold type we would read it as appellants do, although it still could be considered inconsistent with Keogh's unqualified statement, "I didn't ask him to extend leniency." However, the matter does not seem to us to have the significance that appellants' counsel attach to it; evidently it did not strike them as significant at the time, since no exception was taken—and this although a colloquy on the occasion of the newspaper headlines should have alerted counsel to Judge Weinfeld's different understanding of Judge Rayfiel's testimony.

The two exceptions that were taken to the summary of Judge Rayfiel's testimony concern the failure to mention either Judge Rayfiel's corroboration of Keogh's testimony that the appointment for Erdman to come to the Judge's chambers was made on the morning of March 30, or his statement that Justice Keogh had never communicated with him in regard to the Moore case save on those two occasions, which is claimed to discredit the testimony of Moore and Erdman as to the remark allegedly made by Justice Keogh during the restitution phase. We see no need to add to our previous discussion of such omissions beyond pointing out again that, at the jury's request, the whole of Judge Rayfiel's testimony was read to them on the afternoon before they reached their verdict.

III. Matters Arising After Submission to the Jury.

The jury retired to deliberate at 3:50 P. M. on Thursday, June 14, 1962; it rendered its verdict at 7 P. M. on Saturday, June 16; it had sat late on both Thursday and Friday evenings. However, a considerable fraction of this time

was spent in listening to testimony which it had requested. Three episodes in this interval, two relating to the same subject, are attacked.

(1) *Alleged interference with the jury by newsmen.* On Friday afternoon counsel for Justice Keogh brought to Judge Weinfeld's attention that, as he had been informed, photographers and television camera men crowded around the jurors and took their pictures when they left the courthouse late on Thursday night and for lunch on Friday, and "some of the newspapermen were running along beside the jury asking them questions;" he thought it was "the marshal's duty to see to it that it doesn't occur." Government counsel made a similar report and expressed similar concern. The judge shared the concern and stated he would speak to the United States Marshal; no suggestion was then made that he ought declare a mistrial, although Keogh's counsel was to urge this as an additional ground on the motion for a mistrial made that evening on exception to the judge's giving the "Allen charge." After a brief interval the judge recalled counsel and told them, apparently to their complete satisfaction, that he had talked with the Marshal and been assured that such incidents would not be allowed to recur. There is no suggestion that they did.

Appellants assert these facts bring the case within the holding in *Remmer* v. *United States*, 347 U. S. 227, 229 (1954), that "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the

court and the instructions and direction of the court made during the trial, with full knowledge of the parties." But the facts of the *Remmer* case, particularly as these are spelled out in the Supreme Court's subsequent opinion, 350 U.S. 377 (1956), are so different as to make its holding inapplicable. In *Remmer* a juror had received a bribe offer from the defendant which he had reported to the judge, and then had been interviewed by the F.B.I.; the combined effect of the two incidents could well have impaired his freedom in voting. Here there was nothing to indicate that the fleeting remarks of the newsmen, whatever they were, would have frightened or overawed a juror. See *United States* v. *Catalano*, 231 F. 2d 67 (2 Cir. 1956). We do not take lightly such interference with the proper conduct of trials; if camera men and reporters will not police themselves to prevent such annoyance of jurors, and the marshals are unable to police them effectively, sterner measures will be required. However, we see no basis in this episode for setting aside a verdict rendered more than a day after the last of the alleged disturbances—especially when counsel for all parties were apparently satisfied with the measures taken by the judge to put the situation in hand.

(2) *The "Allen charge."* Late in the evening of Friday, June 15, the foreman of the jury sent a note to the court saying "We find it impossible to come to an agreement."[17] The jury having returned to court, the judge addressed them. He referred to the foreman's note as expressing a "desire to discontinue your efforts." He said "It is

17 The judge did not show the note to counsel, although he had it marked as a court exhibit.

desirable if a verdict can be reached that this be done both from the viewpoint of the defendants and the Government", but that this was true only if the verdict "reflects the conscientious judgment of each juror and under no circumstance must any juror yield his conscientious judgment." He noted that "This Court has no purpose to ask and indeed does not have the right to inquire as to how you stand. But considering the length of the trial, the amount of testimony that was taken, the number of witnesses that have been heard, further consideration on your part is fully justified." The judge said in amplification that, considering the time devoted to the reading of testimony and to meals, "you really have not spent more than eight or nine hours in actual deliberations and I do not consider that a sufficient time to have elapsed to permit you a full and fair opportunity not only to review the evidence but to discuss and consider amongst yourselves the various phases of the evidence."

After these and other remarks of like tenor, the judge stated that he wanted "to read to you a statement which is contained in a Supreme Court opinion which is fairly well known to bench and bar called the Allen charge * * *." He then read the familiar statement, 164 U. S. 492, 501 (1896), remarked that it would be best if the jury adjourned its deliberations until morning, and concluded that "It has been a long trial and a trial, as I say, where I am satisfied each side prefers finality of judgment if it can be obtained on the basis of a conscientious reflection of each juror's final vote." Exceptions of defense counsel were overruled and a motion for a mistrial denied; however, the judge recalled the jury and again emphasized, in a variety of ways, that "if any individual juror still retains a con-

scientious view that differs from that of other jurors, * * * you are not to yield your judgment"; "you are not to yield your judgment simply because you may be outnumbered or outweighed," etc.

Quite early on Saturday morning the jury requested a copy of the indictment and two exhibits relating to Kahaner. At 12:30 P. M. it made another inquiry, relating to a Keogh exhibit. After lunch, at 3:20 P. M., it asked for a reading of Judge Rayfiel's testimony, exhibits relating to the pleas and sentencing of the three defendants in the criminal bankruptcy case, and "Allen charge as read to us last night by your Honor." Judge Weinfeld complied with the last request by reading from the Supreme Court's opinion, but again added the caution that "your final vote must be only for that verdict which accords with your individual judgment, based upon the evidence and the law."

This recital of the facts suffices almost without more to dispose of the characterization, made by one of the appellants, that "The jury was being coerced by being subjected, in these circumstances, on two separate occasions, to the 'dynamite' *Allen* charge." On the contrary, if the charge is to be given at all, we do not see how this could be done with less tendency to coercion or more emphasis on the need for conscientious individual agreement than in the way Judge Weinfeld did it.[18] To say that the jury

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18 Recent cases from other Circuits are distinguishable as involving charges that "went beyond" the language of the *Allen* case in urging the jurors to resolve their differences. See *United States* v. *Rogers*, 289 F. 2d 433, 434-37 (4 Cir. 1961); *Powell* v. *United States*, 297 F. 2d 318 (5 Cir. 1961); *Green* v. *United States*, 309 F. 2d 852 (5 Cir. 1962). It is true that some of our colleagues in the Fifth Circuit have expressed in dicta or dissenting opinions doubt whether even the *Allen* charge *simpliciter* should ever be given. *Green* v. *United*

was twice "subjected" to the charge is scarcely accurate; on the second occasion it was the jury itself that asked for rereading of the charge, and it was quite natural for the judge to comply with the request, as the absence of any objection or exception by defense counsel confirms. We readily agree with appellants that the circumstances strongly suggest that the jurors were debating just what the *Allen* charge said—without, however, accepting appellants' conclusion that there was any impropriety in the jury's seeking to settle the argument by the sensible course of asking to hear it again. The case does not present even such evidence of "dynamite" as is sometimes asserted to exist when a verdict follows almost immediately after the giving of the *Allen* charge; the jury continued to deliberate all morning and well into the afternoon, twice asking for pertinent exhibits, returned in mid-afternoon, requesting highly relevant material and the rereading of the *Allen* charge, and then deliberated for another several hours in the light of all it had heard and received.

We are likewise unable to follow appellants' argument that the giving of the charge, or at least the response to the jury's request for its repetition, was unlawful "because the Court could not help but know that the jurors still were in disagreement and that a minority existed," thereby

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States, *supra*, 309 F. 2d at 854 & ns. 1-3; *Huffman v. United States*, 297 F. 2d 754, 759 (5 Cir.) (Brown, J., dissenting), cert. denied, 370 U. S. 955 (1962); *Andrews v. United States*, 309 F. 2d 127, 129 (5 Cir., 1962) (Wisdom, J., dissenting). We respectfully disagree. Giving the charge itself has often—indeed recently—been upheld in this Circuit, *e.g.*, *United States v. Thomas*, 282 F. 2d 191, 195 (2 Cir. 1960); *United States v. Tolub*, 309 F. 2d 286, 289-90 (2 Cir. 1962), and this is *a fortiori* permissible when it is diluted, as it was here, with additional warnings that no juror should give up his individual conscientious judgment.

making applicable the rule of *Burton* v. *United States*, 196 U. S. 283, 307-8 (1905), and *Brasfield* v. *United States*, 272 U. S. 448 (1926), finding error in an inquiry by the judge as to the numerical division of the jury, a rule which we applied in *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506 (2 Cir. 1949), where the inquiry was whether there was "a pronounced majority." We have been cited to no case where this rule was applied in the absence of an inquiry by the judge. Here the court not only made no such inquiry but expressly told the jury that it had "no purpose to ask and indeed does not have the right to inquire as to how you stand." To say that the *Allen* charge, which speaks in terms of the consideration that needs to be given by a dissenting juror "if much the larger number were for conviction" and of the minority's duty "to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority," cannot be given if the judge has any reason to believe that the jury's division is other than even, defies ordinary sense.

Appellants' final contention is that even though we should hold that no one of the matters here considered would alone call for reversal, we must view their points not separately but in combination. That is peculiarly true with respect to a jury trial where there was such real basis for the existence of reasonable doubt and the consequences of a wrong verdict are so tragic. But this was not at all a case where errors, though minor, were numerous. In the long period of the trial prior to the charge, we have noted but one item calling for criticism—and that of the prosecutor and not of the judge; we have

found no errors by the judge in the period during the jury's deliberation, and scarcely any—and these not excepted to—in the charge. Absolute perfection in trials will not be attained so long as human beings conduct them; few trials of this length and difficulty can have been so nearly free of error as this one. Although the closeness of factual issues bears directly on the magnitude of error required for reversal, the command of Congress that "On the hearing of any appeal * * * in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties," 28 U. S. C. § 2111, applies to great causes as well as small. In a case so long and hard-fought as this an appellate court must be careful lest "the perspective of the living trial is lost in the search for error in a dead record," *Glasser* v. *United States*, 315 U. S., *supra*, at 88 (Mr. Justice Frankfurter dissenting). The number of claims of error we have thought it right to discuss in this opinion has been due, not to misconduct of the trial by the able and conscientious judge, but rather to the acumen and assiduity of devoted counsel for the defendants in raising points for our consideration, and also to our own desire, because of the special poignancy of this case, not simply to consider these, as we would in any event, but to state the results of our consideration more fully than we should ordinarily deem appropriate. We hold that the issue of defendants' guilt was placed before the jury in a manner that was fair and in accord with applicable rules of law; our writ runs no further.

The judgment is affirmed.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of April one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

ELLIOTT KAHANER, ANTONIO CORALLO,
JAMES VINCENT KEOGH,
Defendants-Appellants,

ROBERT M. ERDMAN, SANFORD J. MOORE,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION THEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Opinion on Petitions for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 253—October Term, 1962

(Petitions for rehearing, filed May 8 and May 10, 1963
Decided May 27, 1963)

Docket No. 27784

UNITED STATES OF AMERICA,

Appellee,

v.

ELLIOTT KAHANER, ANTONIO CORALLO and JAMES VINCENT KEOGH,

Appellants.

Before:

CLARK, WATERMAN and FRIENDLY, *Circuit Judges.*

ON PETITION FOR REHEARING AND FOR STAY OF MANDATE

PER CURIAM:

The petitions for rehearing point out two respects in which our opinion of April 25, 1963, was incomplete.

The discussion (pp. 1831-32) of the exclusion of testimony by Justice Keogh on the practice of other judges in the Eastern District of New York as to receiving presentence information when he was United States Attorney failed to mention the sustaining of objections to a question addressed to him whether, after his retirement from that post, he had discussed this practice with judges in the Eastern District, and to questions addressed to another state court judge, called as a character witness, whether he had ever spoken to a federal judge before sentencing concerning a man whom he did not represent, and the rejection of an offer to prove that two judges in the Southern District considered it "proper and legal to receive information concerning the family background, status and economic condition of persons about to be sentenced privately and from sources other than the presentence report or governmental agencies." But we hold that the trial judge was warranted in excluding such evidence, the two latter items of which were even more remote and more likely to open up collateral issues. As we pointed out, the Government made no claim of impropriety in Justice Keogh's luncheon conference with Judge Ra iel (although, on his own testimony, he had no information of substance concerning Moore to impart) unless Keogh was acting for a corrupt motive, and Judge Weinfeld charged that all counsel agreed the jury could not find Keogh guilty unless they were convinced that money was paid to him.

The other item is that our discussion of the alleged interference with the jury by newsmen (pp. 1852-53) omitted a statement by Keogh's trial counsel that on Friday evening, June 15, after the judge's instructions to the marshal,

"when we went out to dinner, there were cameramen there. I had to ask them to go away, they wouldn't go away." This in no way affects the point that there was no evidence of further questioning or other harassment of the jury after the incident on Friday noon.

Save for these corrections, the petitions for rehearing, insofar as they seek action by the panel, are denied. Issuance of the mandate is stayed until the entry of an order on the petitions for rehearing in banc. If such petitions should be granted, the mandate will be further stayed until final determination; if they should be denied, it will be stayed for thirty days from the date of such denial and thereafter if within that time a certificate is received from the clerk of the Supreme Court of the United States as to the filing of a petition for certiorari etc. as provided in Rule 28(c) of this Court.

APPENDIX D

Constitutional Amendments, Statutes and Rule Involved

The Fifth Amendment to the Constitution of the United States provides:

> "• • • nor shall any person • • • be deprived of life, liberty, or property, without due process of law; • • • "

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury • • • "

18 U.S.C.

§ 371. *Conspiracy to commit offenses or to defraud the United States.* If two or more persons conspire to commit any offense against the United States, • • • and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000, or imprisoned not more than five years, or both.

• • •

§ 1503. *Influencing or injuring officer, juror or witness generally.* Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other

proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him; or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000. or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

Federal Rules of Criminal Procedure:

Rule 52. *Harmless Error and Plain Error*

• • •

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 304

ELLIOTT KAHANER,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER, ELLIOTT KAHANER

WILLIAM W. KLEINMAN and
EUGENE GOLD,
Attorneys for Petitioner,
66 Court Street,
Brooklyn 1, New York.

Case Parker Inc., 421 Hudson St., N. Y. — ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1962

No. 304

ELLIOTT KAHANER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER, ELLIOTT KAHANER*

I. Introductory: The Factual and Legal Setting of the "Corroboration" Issue.

This reply is confined to the following contention at page 20 of the Government's Brief in Opposition:

> "While it is true that the basic thread of the conspiracy is supplied by accomplices, there are many

* Petitioner owes the Court an explanation for the unusual length of this Reply Brief and for its being filed so near the end of the Court's Summer recess. The Reply Brief aims at an informative treatment of the principal Federal cases on the issue of the need for corroboration of accomplice testimony and of the State cases on the issue of the standard or adequacy of such corroboration. The research for these purposes has had to be done from the cumbersome "Key Number Digest" sources, in the absence of prior systematic treatment of these subjects. This has taken time, and presentation of the results herein takes considerable space in printed pages.

> points of corroboration. The telephone logs, the marked papers on the restitution plan, Judge Keogh's cards, the testimony of secretaries, and of the nonaccomplice lawyers, Becker, Jaspan and Williams, all bolster the narrative of the government's principal witnesses."

Insofar as the above contention of the Government is addressed to the case of petitioner Kahaner, we take it that the contention is aimed at Kahaner's argument in his Petition for Certiorari herein (pp. 33-34) that his conviction was based solely on the uncorroborated testimony of accomplices, and that this Court should re-examine and modify the Federal rule that accomplice testimony does not require corroboration.

The Government's intimation in the above quoted statement that the accomplice testimony against Kahaner was corroborated, makes it pertinent to mention, to begin with, that both of the Courts below viewed the conviction as resting dispositively if not exclusively on the accomplice testimony. Thus, as we noted in Kahaner's Petition for Certiorari, the opinion of the Court of Appeals remarked that the Government's case "was based mainly on the testimony of Erdman and Moore—concededly interested witnesses * * * *" (Appendix to Kahaner's Petition, p. 4a). We are now to note also that the Trial Court instructed the jury that "indeed, if you do not believe these witnesses [the accomplice witnesses], particularly Erdman and Moore, I would say you should acquit the defendants, since the structure of the Government's case in large measure rests upon their testimony" (II. 387a).*

* We adopt in this reply brief the Government's method of referring to the several printed appendices herein. See the Government's Brief in Opposition herein, at page 2, footnote 1.

It is true that the Trial Court also instructed the jury as follows:

> "To establish the proof of the conspiracy and the participation therein by the individual defendants, the Government relies, in the main, upon the testimony of Erdman and Moore. It also offers the testimony of other co-conspirators, and that of independent witnesses to corroborate, in some instances, Erdman's and Moore's testimony. It also relies upon documentary evidence." (II. 357a).

On the other hand, the Trial Court also instructed the jury as follows:

> "* * * if you should find that no cash payment was made to Keogh or Kahaner—as Erdman and Moore testified was made—then on the evidence here presented, there would be no basis for a finding of corrupt endeavor.
>
> All counsel agree that the central and basic issue in the case is whether the money was paid over to Keogh or Kahaner * * *." (II. 383a).

Our reason for quoting this last item from the instructions to the * * * will become apparent *infra*, where we expect to show that, if a requirement of corroboration should be applied here, the corroboration would have to relate to the essential element of the paying over of the money.

Before setting forth the authorities for the proposition that corroboration should be required and that the supposed "points of corroboration" mentioned by the Government are insufficient under the standards followed in the jurisdictions which do require corroboration, let us first examine

briefly these "points of corroboration" referred to by the Government insofar as they may affect petitioner Kahaner's situation:

The first such "point" mentioned by the Government is "the telephone logs". Insofar as there was testimony about telephone logs affecting Kahaner, it consisted only of the following items: (1) Kahaner's telephone message book showed a telephone call or calls from the accomplice witness Erdman; (2) Kahaner's telephone message book also showed a call from defendant Keogh setting up a luncheon appointment for April 5, 1961. Kahaner admittedly knew Erdman well, and was a medical patient of his, so that a bare showing of a telephone call from Erdman is "corroborative" of nothing (E.g., II. 263a). As to the April 5 luncheon, Kahaner readily admitted that this luncheon took place, as did Keogh also, both of them saying that the problem of the criminal proceedings in the bankruptcy case was not discussed at the luncheon (II. 281a 282a, 316a).

The Government's second suggested "point of corroboration" consists of "the marked papers on the restitution plan". This refers to nothing more than the overall picture of the existence of a restitution plan, which Kahaner concedes. However, the disinterested attorney Becker and Jaspan testified that Kahaner at a meeting opposed the plan to reduce the jail sentences in consideration of the financial restitution (II. 219a-222a, 239a-240a); and the testimony is uncontradicted that Kahaner's very presence at the latter meeting was virtually the result of a command from Judge Rayfiel, the regular Assistant United States Attorney assigned to the case (Williams) being unavailable (II. 237a 239a).

The Government's third "point of corroboration" is "Judge Keogh's cards". This does not affect petitioner Kahaner.

The Government's next "point of corroboration" is "the testimony of secretaries". This consisted of the testimony of Rose St. George, which was not "corroborative" of any element of the offense charged, and the testimony of Rose Kippe which likewise was not "corroborative". Miss St. George testified that Kahaner was at an office party on April 3, 1961 from 4 P.M. until past 5:30 P.M., when Kahaner was supposed to have been meeting with the alleged conspirators and demanding additional money (contrast II. 242a-243a with II. 114a, 44a-45a). Miss Kippe identified Kahaner's diary entry of the morning of March 29, 1961, and she gave direct testimony, which confirmed Kahaner's claim that he had been at a meeting with Judge Frank, at a time when he is supposed to have been guiltily meeting with the co-conspirators (contrast II. 307a-309a with II. 40a-41a, 109a-110a). Judge Frank's testimony, as a Government witness, substantially supported Kahaner's claim in this respect (II. 318a-320a).

The Government's final "point of corroboration" is "the testimony * * * of the non-accomplice lawyers, Becker, Jaspan and Williams". Mr. Jaspan's testimony related solely to the restitution phase, which we have treated above. Mr. Becker, who was the original attorney for the bankruptcy prosecution defendants, did not "corroboratingly" inculpate Kahaner in any way. Becker's testimony had to do with (1) the early discussions as to non-indictment of some of the bankruptcy case defendants, (2) the alleged arrangements for a guilty plea, and (3) the restitution plan. The restitution feature has been discussed above. The early

arrangements for non-indictment of some of the defendants are fully explained at pages 6-8 of the Kahaner Petition for Certiorari herein. The matter of the guilty plea, insofar as this involves the testimony of Becker, is to the effect that Becker was of the belief that his clients were going to plead not guilty, whereas Kahaner had stated that the clients were going to plead guilty (III. 116, 117). Kahaner testified that Erdman had told him, while Kahaner was in Erdman's office for surgery, of the bankruptcy defendants' intention to plead guilty (II. 262a). As to the Government's reference to the "corroborative" testimony of Assistant United States Attorney Williams, this relates to (1) the arrangements for non-indictment of some of the bankruptcy defendants, (2) Kahaner's announcement to Williams that there would be a guilty plea, (3) the question of the Government's opposition to withdrawal of the guilty plea, and (4) the question of who would argue the Government's case on appeal. The first of the above mentioned items, as to the non-indictment of some of the defendants, has been treated above. Likewise as to the second of those items, regarding the proposed guilty plea. The item as to withdrawal of the guilty pleas is "corroborative" of nothing because Williams testified that he had opposed the withdrawal and that this had occurred with the approval of Kahaner (II. 184a). The item as to the arguing of the Government's appeal in connection with withdrawal of the guilty pleas relates to testimony by the accomplices Moore and Erdman that Kahaner had said that he was going to argue the appeal (IV. 84). However, Williams' supposed "corroboration" of this was, actually, to the effect that it was the custom for the United States Attorney himself to argue all appeals, and that Kahaner (then recently named Acting United States Attorney) had said he might want

to argue the appeal in question, at which Williams said "he was not surprised" and that "there was nothing unusual about that". Thereafter Kahaner instructed Williams himself to argue the appeal, which was done. See II. 182a-184a.

Under our heading "III", *infra*, we take up the authorities which show that in jurisdictions applying the requirement of corroboration of accomplice testimony, the above supposed "points of corroboration" cited by the Government herein as against Kahaner would be utterly insufficient to satisfy the standards of such "corroboration". Before asking this Court to consider these last mentioned authorities, we shall undertake to show that such requirement of corroboration should be applied in the instant case.

II. The Federal Rule as to Corroboration of Accomplice Testimony.

As we pointed out in our Petition for Certiorari herein (p. 33), the only explicit declaration which has ever been made by this Court on the question of whether corroboration of accomplice testimony is *required* in Federal criminal trials, is merely the statement that no absolute requirement of such corroboration exists. *Caminetti* v. *United States*, 242 U. S. 470, 495-496. The *Caminetti* case was decided by this Court on January 15, 1917. At the same Term of this Court, on June 11, 1917, the Court decided *Valdez* v. *United States*, 244 U. S. 432, affirming a conviction for murder committed in the then territory of the Philippine Islands. So far as appears from the report of this Court's decision in *Valdez*, and from the description of the arguments and briefs of counsel in the Lawyers Edition Report

(61 L. Ed., pp. 1242 *et seq.*), the case did not involve any statutory or constitutional provision applicable to the Philippines Territory which would have required corroboration of accomplice testimony. It is therefore of considerable interest that the Court in *Valdez* expressly undertook to examine whether there had been corroboration of the accomplice testimony in that case (244 U. S. at 440-442). Both the majority and minority opinions in *Valdez* make it rather plain that the probable reason why the Court felt called upon to look into the question of corroboration was that the accused (Valdez) was a person of the highest cultural and social background, whereas the accusing accomplice was a person of conspicuously corrupt character. These circumstances in the *Valdez* case which seemingly led the Court to attach importance to the question of corroboration of accomplice testimony within barely six months after the Court's qualified negation of the requirement of such corroboration in the *Caminetti* case, persuasively suggests that the Court never intended, by the *Caminetti* decision, to rule out the necessity for considering the sufficiency of corroborating evidence on an unvarying and unqualified basis in Federal criminal proceedings, but that at least in cases where there is presented a striking disparity between the respective character backgrounds of the accused and the accomplice, considerations of justice would favor that a Federal court should undertake such inquiry into the sufficiency of the corroboration. We respectfully submit that the instant case, involving a former high Federal prosecutive official of unblemished background and brilliantly promising career prospects, and a former State Judge of distinguished prior reputation, calls for the closest scrutiny of the sufficiency of the allegedly corroborative

evidence which the Government adduced in ostensible support of the testimony of accomplices who in this instance happen to be also persons of base character as shown either by their prior histories or by their performance in the instant trial.

For a comprehensive collection of the older American authorities—preceding the *Caminetti* case—which required corroboration of accomplice testimony, see the Reporter's notes of the argument of counsel in 61 L. Ed. at pp. 444-445.

An additional persuasive indication that this Court's enunciation in the *Caminetti* case, *supra*, of the principle that corroboration of accomplice testimony is not an absolute requirement in Federal criminal trials was not intended to mean that the failure to require such corroboration would never be error, is found in *Holmgren* v. *United States*, 217 U. S. 509, decided in 1910 by the unanimous Court and never thereafter criticized, disparaged or departed from in any other decision of this Court (including *Caminetti*). In *Holmgren* the Court said that "It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, *and to require corroborating testimony before giving credence to them*" (pp. 523-524). (Emphasis supplied.)

In *Caminetti* this Court referred to *Holmgren*, stating that in the latter case "* * * this Court refused to reverse a judgment for failure to give an instruction of this general character [i.e., that accomplice testimony must be corroborated] while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence" (242

U. S. at 495). The Court immediately then went on to say, in *Caminetti*, that "while this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them" (*ibid*). Thus the Court in *Caminetti* appears to have fully preserved in force the "better practice" standards laid down in *Holmgren*.

Also, nearly three years after *Holmgren*, this Court in *Bennett* v. *United States*, 227 U. S. 333, 339 (decided February 24, 1913), although not referring to *Holmgren*, had treated an issue of corroboration of accomplice testimony on the basis of the apparent assumption that such corroboration might properly be required.

The earliest decision in the lower Federal courts which noticed the *Holmgren* ruling was *Richardson* v. *United States*, 181 Fed. 1, 9 (C.C.A. 3 1910), where the *Holmgren* case was cited only for the following proposition:

> "No doubt there is a well established practice, sanctioned by long practice and judicial approbation to caution juries about accepting the evidence of an accomplice without material corroboration, coming, as it does, from a polluted source. But this is as far as the matter goes."

Thus, within a few months after this Court's decision in *Holmgren*, and several years before *Caminetti*, there had commenced in the lower Federal courts that emasculative interpretation of the *Holmgren* language which was eventually to become virtual gospel in Federal criminal trials, namely, that there is *never* any need for a court to insist upon corroboration of accomplice testimony and the most that is needed is a cautionary instruction to the jury.

Similarly, the frequently cited case of *Pina* v. *United States*, 165 F. 2d 890, 892-893 (C.C.A. 9 1948), often referred to in the decisions of the lower Federal courts which say that corroboration of accomplice testimony is not required in Federal criminal proceedings, deals only with the question of the cautionary instruction as to the weight to be attached to accomplice testimony. See also Mr. Justice Jackson, concurring, in *Krulewitch* v. *United States*, 336 U. S. 440, 454: "* * * in Federal practice there is no rule preventing conviction on uncorroborated testimony of accomplices, as there are in many jurisdictions, and the most comfort a defendant can expect is that the Court can be induced to follow 'the better practice' and caution the jury against 'too much reliance on the testimony of accomplices' ". Here again, we see, how, almost *sub silentio* as it were, the "better practice" which in the *Holmgren* case was stated to include both the general cautionary instruction and the requirement of corroboration, has reductively evolved into a "better practice" requirement only as to the cautionary instruction. Similarly, *Phelps* v. *United States*, 252 F. 2d 49, 52 (C.A. 5 1958), cites the *Holmgren* case only for the portion of the statement therein regarding accomplice testimony which states that the jury should be cautioned against placing too much reliance upon the testimony of an accomplice. And see *Lyles* v. *United States*, 249 F. 2d 744, 745 (C.A. 5 1957), treating the *Holmgren* rule as "dictum". Even more reductive—indeed obliterative—is *Doherty* v. *United States*, 230 F. 2d 605 (C.A. 9 1956), holding, on the basis of *Caminetti* and even of *Holmgren* itself, that "corroboration is not essential". Again, in *Cowell* v. *United States*, 259 F. 2d 660, 661 (C.A. 9 1958), the Court

took it upon itself—unwarrantedly, we submit—to observe that in the *Caminetti* case this Court treated the rule of the *Holmgren* case, *supra*, as "mere dicta". The Court in *Cowell* expressly rejected appellant's request, based on the *Holmgren* case, that the Federal rule be stated as one requiring corroboration of accomplice testimony. See also *Mimms* v. *United States*, 254 F. 2d 654, 655-658 (C.A. 9 1958), construing *Caminetti* as having in some sense overborne *Holmgren*. In *Audett* v. *United States*, 265 F. 2d 837, 846-848 (C.A. 1959), involving primarily an objection that the trial court had not given the familiar cautionary instruction in regard to accomplice testimony, and secondarily a request by appellant's counsel for adoption of the rule that conviction cannot be had on the uncorroborated testimony of an accomplice, the Court stated that any change of the rule should be made by Congressional legislation or by the Supreme Court.

Let us now retrace our steps back to what we may term the "pro-*Holmgren*" cases of the early part of the century:

In the second of the cases in the lower Federal courts wherein the *Holmgren* rule was noted, a case arising in 1913 in the Eighth Circuit (opinion by Sanborn, *C.J.*), the matter went quite differently from the way it had gone in the *Richardson* case in the 3rd Circuit in 1910, *supra*. We refer to *Sykes* v. *United States*, 204 Fed. 909, 913 (C.C.A. 8 1913), where the Court said:

> "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt that one may lawfully be convicted of a crime. 'It is undoubtedly the better practice,' says the Supreme Court, 'for courts to caution juries against too much reliance upon the testimony of

> accomplices, and to require corroborating testimony before giving credence to them.' Holmgren v. United States, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778). And the conclusion is that the uncorroborated testimony of the confessed perperator of a crime, contradicted under hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it. Jahnke v. State, 68 Neb. 154, 104 N. W. 154, 158."

Moreover, in a ruling reminiscent of the "plain error" rulings of contemporary Federal criminal practice, the Court in *Sykes* rejected a contention by the Government that a point as to non-corroboration of the accomplice testimony had not been preserved by the defense through an express request for a peremptory instruction after the close of the evidence; the Court saying (204 Fed. at 913-914):

> "* * * But there is an exception to this general rule which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error." (Citing authorities)

The Court concluded its opinion in the *Sykes* case with still a further ringing expression of its indignation at being asked to affirm a criminal conviction based on the uncorroborated testimony of an impeached accomplice witness (204 Fed. at 914):

> "The defendant in this case may not be lawfully deprived of his liberty for five years without proof of his guilt beyond a reasonable doubt, much less without any substantial evidence of it, and this court cannot disregard his appeal, sit in silence, and permit the perpetration of such an injustice."

The *Sykes* case was followed in *Fain v. United States*, 209 Fed. 525, 533 (C.C.A. 8 1913).

The next case in which the *Holmgren* rule was noticed was *Diggs v. United States*, 220 Fed. 545 (C.C.A. 9 1915). This is the case which later was decided by this Court under the name of the *Caminetti* case, *supra*. In *Diggs*, the Ninth Circuit said, "Notwithstanding the views expressed by the Supreme Court in the *Holmgren* case as to the better practice, that Court and the Federal courts generally have held that corroborating testimony is not necessary to support a conviction" (220 Fed. at 552). No decision of this Court was cited to support this last quoted statement.

The next decision in which the *Holmgren* rule was noticed was *Mark Yick Hee v. United States*, 223 Fed. 734 (C.C.A. 2 1915), where the Court apparently construed *Holmgren* as meaning only that "There is no common law rule which forbids a conviction upon the uncorroborated testimony of an accomplice whose evidence satisfies the jury beyond a reasonable doubt of the guilt of the accused" (p. 735).

In February 1917, about two weeks after this Court's decision in *Caminetti*, the Third Circuit again followed its ruling in the *Richardson* case, *supra*, which, as we view it, gave an emasculative meaning to the *Holmgren* rule. *Knoll* v. *United States*, 239 Fed. 16, 20-21 (C.C.A. 3 1917).

Of special interest as indicating how a conscientious Federal trial judge in the era immediately following the *Caminetti* decision was understanding this Court's declaration in the latter case, see *United States* v. *Murphy*, 253 Fed. 404, 406 (N.D. N.Y. 1918), where the Court, treating the *Holmgren* rule as being still controlling, and evidently referring to the *Caminetti* case and similar decisions of the lower Federal courts, said that those cases do "not hold, as contended for by counsel, that corroboration of an accomplice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached. The Supreme Court, in such instances, as declared in the *Holmgren case*, *supra*, holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence. . . ."

Again in 1919, two years after the *Caminetti* decision, the *Holmgren* rule was fully applied so as to bring about a reversal of a conviction *in the Second Circuit*. *McGinniss* v. *United States*, 256 Fed. 621, 626 (C.C.A. 2 1919). The Court said (p. 626):

> ". . . It is only when the evidence is sufficiently convincing of the guilt of the accused beyond a rea-

sonable doubt that one may lawfully be convicted of a crime, and, in a case such as this, the better practice was not to place reliance upon the testimony of this accomplice and to require corroborating testimony before giving credence to him. Holmgren v. U. S., 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778. We feel required to say that the uncorroborated testimony of this perpetrator of a crime, confessed under oath, and not supported by other witnesses, with a possible hope of immunity from punishment, is not only insufficient to establish the guilt of the plaintiff's in error beyond a reasonable doubt, but that it presents no substantial evidence of it."

See also *Freed* v. *United States*, 266 Fed. 1012, 1014-1016 (D.C. App. 1920), where the Court referred to the fact that "for more than forty years in this jurisdiction it has been the practice to safeguard the interests of accused in prosecutions for serious offenses, where the testimony of accomplices has been admitted, by bringing directly to the attention of the jury the nature of such evidence, and the danger of convicting unless they should find supporting or corroborating evidence". The Court then went on to explain its view of the net combined effect of the *Holmgren* and *Caminetti* cases saying: "Certain it is that the Supreme Court has not ruled that the refusal of a trial court to grant a proper instruction, in a case where there is little, if any, evidence other than that of accomplices, is not so prejudicial to the accused as to warrant an appellate court in awarding him a new trial" (p. 1016).

In *Wagman* v. *United States*, 269 Fed. 568, 572 (C.C.A. 6 1920), the Court reiterated the *Holmgren* rule that "It would have been better practice to caution the jury against

relying too greatly upon the testimony of these accomplices, and to require corroborating testimony before giving it credence, * * *".

In *Morenkow* v. *United States*, 276 Fed. 293, 294 (C.C.A. 6 1921), the Court noted the *Holmgren* rule and that in the subject case the jury had been advised that it was "unsafe to convict a man under trial upon the uncorroborated testimony of an accomplice", the Court noting also that there had been such corroboration in the *Morenkow* case. To the same effect, see *Rudner* v. *United States*, 281 Fed. 516, 521 (C.C.A. 6 1922).

It is true that a little less than two years after the decision in *McGinniss*, *supra*, the same Second Circuit bench which had decided that case ruled in *Rosen* v. *United States*, 271 Fed. 651, 656 (C.C.A. 2 1920) that corroboration of accomplice testimony was not absolutely essential to conviction, but, in approving a jury instruction in the *Rosen* case which included the statement that "if, in your judgment, there are no surrounding circumstances tending to corroborate them, you will be justified in rejecting their testimony" the Court referred to the *Holmgren* rule.

It is true also that by the early part of the year 1923 the Second Circuit (again the same bench as in *McGinniss*, *supra*) seems to have gone over all the way to the narrower interpretation of the *Caminetti* case, *viz.* that, unqualifiedly, corroboration of accomplice testimony is not required. *Rachmil* v. *United States*, 288 Fed. 782, 785 (C.C.A. 2 1923).

By the mid-1920's, the unqualified reading of the *Caminetti* language that corroboration is not absolutely required appears to have become the set pattern among the Federal

circuits, and the *Holmgren* rule receded from attention. E.g., *Betz* v. *United States*, 2 F. 2d 552, 554 (C.C.A. 6 1924); *White* v. *United States*, 4 F. 2d 758, 759 (C.C.A. 9 1925).

However, the Eighth Circuit continued its seeming preference for the *Holmgren* rule. *Rossi* v. *United States*, 9 F. 2d 362, 366 (C.C.A. 8 1925); *Lett* v. *United States*, 15 F. 2d 686, 689 (C.C.A. 8 1926). Still, soon after this, in another case, the Eighth Circuit appears also to have switched over to the unqualified version of the *Caminetti* rule. *Wishart* v. *United States*, 29 F. 2d 103, 105 (C.C.A. 8 1928).

Of prime interest, and closer to the contemporary scene, is *Arnold* v. *United States*, 94 F. 2d 499 (C.C.A. 10 1938), where the Court appears to have invoked the test of sufficiency of corroboration of accomplice testimony on the ground that the trial court had not given the jury an adequate instruction along general cautionary lines as to the weight to be given to accomplice testimony. See 94 F. 2d at 501, 506-509. This step by the Tenth Circuit in the *Arnold* case is extremely interesting, we submit, as indicating once again the continuing vitality of the *Holmgren* rule as a matter of justice and fairness at least on a case by case basis. The *Arnold* case was cited with approval, and the seeming principle laid down in the *Arnold* case as above described was apparently approved, in the more recent Tenth Circuit case of *Johns* v. *United States*, 227 F. 2d 374, 375 (C.A. 10 1955). Also citing the *Arnold* case with seeming approval of the point hereinabove described is *People* v. *Dail*, 140 P. 2d 828, 834 (S. Ct. Cal. 1943), where the Court quotes a passage from "*American Jurisprudence*" which is to the same effect as the *Arnold* point. See also the dissenting opinion of Circuit Judge Frank in *United States* v.

Antonelli Fireworks Co., 155 F. 2d 631, 646, fn. 9a (C.C.A. 2 1946).

The chief importance, however, of the above mentioned point in the *Arnold* case as regards the instant Petition for Certiorari, is that the Second Circuit (where the instant proceeding arises) has expressly rejected the *Arnold* point. *United States* v. *Gallo*, 123 F. 2d 229, 230-231 (C.C.A. 2 1941). We therefore submit that thereby a conflict of Circuits arises between the Second and Tenth Circuits, a conflict such that this Court should intercede for the resolution of this important question in the administration of Federal criminal justice.

That the *Holmgren* rule is by no means dead in the doctrinal thinking of Federal judges is further shown by *Smith* v. *United States*, 224 F. 2d 58, 60 (C.A. 5 1955), where the Court referred to " * * * the principle that the testimony of a co-conspirator must be received with caution and should be corroborated, as here, by other evidence", citing *Caminetti* and *Holmgren*. Cf. also *Gormley* v. *United States*, 167 F. 2d 454, 457 (C.C.A. 4 1948), quoting with approval the earlier Fourth Circuit case of *Hoback* v. *United States*, 296 Fed. 5, 8 to the effect that "there is no hard and fast rule requiring the corroboration of an accomplice" in the Federal courts. This language denotes, once again, that there is at least a certain residual doctrinal vitality in the *Holmgren* rule.

Also, notwithstanding the supposed universality of the more recent rule dispensing with the requirement of corroboration of accomplice testimony, there are additional cases indicating that some of the Circuits do occasionally reason in terms of a seeming acceptance of the right of a defendant to insist upon such corroboration. E.g., *Gordon*

v. *United States*, 164 F. 2d 855, 859 (C.C.A. 6 1947), cert. denied 333 U. S. 862; *Stewart* v. *United States*, 131 F. 2d 624 (C.C.A. 5 1942), cert. denied 318 U. S. 779; *Stahley* v. *United States*, 245 F. 2d 427, 433 (C.A. 6 1957).

We note also, incidentally, that in *Barnett* v. *Government of Canal Zone*, 25 F. 2d 459 (C.C.A. 5 1928), the Court applied the Canal Zone statute that a conviction cannot be had on the uncorroborated testimony of an accomplice. Cf. also *Ing* v. *United States*, 278 F. 2d 362, 366 (C.A. 9 1960), and *Christy* v. *United States*, 261 F. 2d 357, 359 (C.A. 9 1958), cert. denied 360 U. S. 919, applying the Alaska Territorial statute requiring corroboration and setting the standards therefor.

It is submitted that the facts of the present case justify a re-examination of the federal accomplice-testimony-corroboration rule and a determination by this Court that the conviction of petitioner Kahaner cannot be supported on the basis of the testimony in this record. The issue is deserving of certiorari.

III. The Standards of Adequate Corroboration as Applied in Jurisdictions Requiring Corroboration of Accomplice Testimony.

1. Corroborating evidence must be inconsistent with innocence. *People* v. *Anthony*, 29 Cal. App. 2d 290, 84 P. 2d 523 (1938). If the corroborative evidence as to the circumstances of the commission of the offense indicates that those circumstances, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration and conviction thereon will be set aside on

appeal. *People* v. *Woodcock*, 52 Cal. App. 412, 199 P. 565 (1921); *People* v. *Janssen*, 74 Cal. App. 402, 240 P. 799 (1925). The rule of inconsistency with innocence is observed throughout the state jurisdictions. E.g., *State* v. *Ellsberg*, 209 Minn. 167, 295 N. W. 913 (1941); *Thompson* v. *State*, 207 Ark. 680, 182 S. W. 2d 386 (1944); *Sorrell* v. *State*, 249 Ala. 292, 31 So. 2d 82; *State* v. *Clark*, 284 P. 2d 700, 3 Utah 2d 382; *State* v. *Jones*, 95 Mont. 317, 26 P. 2d 341 (1933).

2. Likewise universal is the rule that mere conjecture or suspicion, even "grave suspicion", raised by corroborating evidence, is insufficient. *People* v. *Kempley*, 205 Cal. 441, 271 P. 478 (1928); *People* v. *Davis*, 210 Cal. 540, 293 P. 32 (1930) (grave suspicion); corroboration cannot be accomplished by piling suspicious circumstance upon suspicious circumstance, nor by building up conjecture upon conjecture (*People* v. *Reingold*, 87 Cal. App. 2d 382, 197 P. 2d 175); proof of mere opportunity raises no more than a suspicion of guilt and is insufficient corroboration (*People* v. *Braun*, 31 Cal. App. 2d 593, 88 P. 2d 728 (1939). To similar effect, see *State* v. *Huntington*, 80 N. W. 2d 744 (S. Ct. Iowa 1957); *Sorrell* v. *State*, 249 Ala. 292, 31 So. 2d 82; *Allan* v. *State*, 111 S. E. 2d 70 (S. Ct. Ga. 1960) (grave suspicion insufficient); facts creating grave suspicion are insufficient, indeed facts even though creating a moral conviction of guilt are insufficient if they do not connect the accused with the crime independently of the accomplice testimony (*Jolly* v. *State*, 41 Ga. App. 494, 153 S. E. 432 (1930)); for the purpose of corroborating testimony which is considered too unreliable to take human liberty, something stronger is required than mere suspicion (*Almazan*

v. *State*, 140 Tex. Cr. R. 432, 145 S. W. 2d 576 (1939)); *State* v. *McLaughlin*, 84 N. W. 2d 664 (S. Ct. Minn. 1957) (mere suspicion insufficient); *People* v. *London*, 166 N. Y. S. 2d 597 (Gen. Sess. 1957) (same); *State* v. *Erwin*, 101 Utah 365, 120 P. 2d 285 (1942) (grave suspicion); *State* v. *Gates*, 67 N. W. 2d 579 (S. Ct. Iowa) (mere suspicion); *Hankins* v. *State*, 62 Okla. Cr. 252, 71 P. 2d 119 (1937) (mere suspicion); *State* v. *Reynolds*, 160 Ore. 445, 86 P. 2d 413 (1939) (mere suspicion); proof of mere suspicious circumstances and conjecture together with proof of opportunity to commit the crime charged is insufficient corroboration (*State* v. *Keckonen*, 107 Montana 253, 84 P. 2d 341 (1938)); *Thompson* v. *State*, 207 Ark. 680, 182 S. W. 2d 386 (1944) (mere suspicion).

3. The corroboration must be of a "substantial" character. *Webb* v. *State*, 206 Ark. 640, 176 S. W. 2d 915 (1944); *Stevenson* v. *State*, 50 Okla. Cr. 295, 297 P. 328 (1931); *State* v. *Yeaen*, 86 Mont. 251, 283 P. 210 (1930). It must show "with some cogency" facts authorizing the jury to believe the accomplice. *Odneal* v. *State*, 117 Tex. Cr. R. 97, 34 S. W. 2d 595 (1931). Uncertain or equivocal corroboration is insufficient. *State* v. *Reynolds*, 160 Ore. 445, 86 P. 2d 413 (1939); *Logan* v. *State*, 44 So. 2d 634, cert. denied 44 So. 2d 638 (Ala. App.). The corroborative evidence must satisfy the jury of the truth thereof beyond a reasonable doubt, and the jury must believe beyond a reasonable doubt that it tends to connect the defendant with commission of the crime charged. *Cobb* v. *State*, 20 Ala. App. 3, 100 So. 463 (1924), cert. denied *sub nom. Ex parte State ex rel. Attorney General*, 211 Ala. 320, 100 So. 466; *Powell* v. *State*, 172 Ark. 938, 9 S. W. 2d 583 (1928).

4. The rule seems to be universal throughout the American jurisdictions that in deciding the sufficiency of corroboration of accomplice testimony, the Court must eliminate such testimony and determine whether the other evidence, offered in corroboration, is sufficient to connect the accused with the crime. E.g., *Grady* v. *Commonwealth*, 237 Kentucky 156, 35 S. W. 2d 12 (1931); *People* v. *Leavitt*, 106 Cal. App. 93, 279 P. 1056 (1929); *Davis* v. *State*, 43 Ga. App. 187, 158 S. E. 344 (1931); *Cruz* v. *State*, 40 Ariz. 436, 14 P. 2d 247 (1932); *Chancellor* v. *State*, 23 Ala. App. 504, 127 So. 912 (1930); *State* v. *Paderes*, 187 Minn. 622, 246 N. W. 369 (1933); *State* v. *Smith*, 75 Mont. 22, 241 P. 522 (1926); *State* v. *Todd*, 62 N. D. 479, 244 N. W. 25 (1932); *Hewett* v. *State*, 38 Okla. Cr. 105, 259 P. 144 (1927); *State* v. *Owen*, 119 Ore. 15, 244 P. 516, (1926); *Watkins* v. *State*, 102 Tex. Cr. R. 219, 277 S. W. 397 (1926); *State* v. *Coroles*, 74 Utah 94, 277 P. 203 (1929); *People* v. *Kress*, 284 N. Y. 452, 31 N. E. 2d 898 (1941); *People* v. *Pauley*, 281 App. Div. 223, 119 N. Y. S. 2d 152. In *Lynch* v. *State*, 158 Ga. 261, 123 S. E. 289 (1924), the rule was formulated so as to make it absolutely unmistakable that the corroborative evidence must do more than merely place the accused somewhere vaguely within the overall scene or picture of the alleged offense, and that such evidence must rather actually point rationally to the actual guilt of the accused, the Court saying that to authorize conviction on the testimony of an accomplice, the corroborating circumstances should independently connect the defendant with the offense and raise an inference of guilt independently of the accomplice testimony. The New York Court of Appeals has formulated the rule in words similar to those of the Supreme Court of Georgia in the *Lynch* cases, *supra*. Thus in *People* v. *Cohen*, 223 N. Y. 406,

119 N. E. 886 (1918), re-argument denied 227 N. Y. 623, 125 N. E. 921, the test is stated as being that the corroborative evidence must tend to show not only that a crime has been committed but that the defendant was "implicated" in it. Similar language ("implicated in the commission of the crime") is found in *Livingston* v. *State*, 233 P. 235 (Okla. Cr. App. 1925). Similar also, of course, are the innumerable decisions which speak of the requirement that the corroborative evidence shall tend to connect the defendant with the *commission* of the offense. E.g., *Weaver* v. *State*, 22 Okla. Cr. 414, 211 P. 1062 (1923); *State* v. *Turnbow*, 99 Ore. 270, 193 P. 485 (1920), rehearing denied 99 Ore. 270, 195 P. 569; *Perkins* v. *State*, 20 Ala. App. 113, 101 So. 85 (1924); *Jenkins* v. *State*, 23 Ariz. 485, 205 P. 322 (1922); *Rogers* v. *State*, 136 Ark. 161, 206 S. W. 152 (1918); *People* v. *Rose*, 42 Cal. App. 540, 183 P. 874 (1919); *State* v. *Sonnenscheid*, 37 S. D. 585, 159 N. W. 101 (1916); *Meredith* v. *State*, 85 Tex. Cr. R. 239, 211 S. W. 227 (1919) (there should be "criminative facts proved which tend to connect accused definitely and immediately with the commission of the offense"); *State* v. *Bridwell*, 48 Utah 97, 158 P. 710 (1916). Cf. also *Halbadier* v. *State*, 85 Tex. Cr. R. 593, 214 S. W. 349 (1919) ("matter legally tending to show defendant's guilt"); *Thomas* v. *State*, 89 Tex. Cr. R. 129, 230 S. W. 159 (1921) (the corroboration, "in order to be sufficient, must of itself tend to connect accused in a guilty way with the transaction in question"). Cf. also the cases in which the test is stated in terms of "inculpatory" or "incriminating" corroborative evidence.* It is of interest also that the rule

* E.g., *Lynch* v. *State*, 130 Tex. Cr. R. 110, 124 S. W. 2d 362 (1939); *People* v. *Goldstein*, 303 P. 2d 892 (Cal. App. 1957). There must be evidence, independent of the accomplice's testimony, which would lead reasonable minds to the belief that the defendant criminally participated in the crime charged. *State* v. *Oster*, 370 P. 2d 83 (S. Ct. Ore. 1962).

atively exhaustive attention which the Texas courts have given to the question of the sufficiency of corroborative evidence has included an effort at the defining of the word "tend" (i.e., in connection with the typical statutory language requiring that the corroborative evidence shall tend to connect the defendant with the commission of the offense). Thus, in *Boone* v. *State*, 90 Tex. Cr. R. 374, 235 S. W. 580, 584 (1921) the Court said:

> "In part, the word 'tend' is defined to mean:
>
> 'To serve, contribute or conduce in some degree or way; to have a more or less direct bearing or effect.' Century Dictionary and Webster's Dictionary.
>
> 'It does not contemplate conjecture, but that the testimony shall have a tendency to prove the averments in the indictment.' Words and Phrases, vol. 4, Second Series 874."

See also *Stepp* v. *State*, 92 Tex. Cr. R. 325, 244 S.W. 141 (1922), where the test of the sufficiency of corroboration evidence was stated as being, "does such evidence in and of itself tend to connect the accused with the commission of the offense"; to similar effect, see *Bevil* v. *State*, 93 Tex. Cr. R. 412, 247 S. W. 1024 (1923). See also *Sims* v. *State*, 95 Tex. Cr. R. 164, 253 S. W. 278 (1923), to the effect that the corroborative evidence "must point to the accused with some criminative force as being a guilty party". In other words, "tend" does not mean merely "tendentious". In every single instance the "points of corroboration" adduced by the Government in the instant case are at the very most merely tendentious in their "corroborative" effect concerning the alleged guilt of petitioner Kahaner. We thus see that the familiar language in the corroboration cases

from the various jurisdictions to the effect that the corroborative evidence must tend to connect the defendant with the crime, is not some empty or abstract formula which allows conviction upon merely any vague or tenuous "connecting" evidence. The cases make it clear that this "connection" must be sufficient to "raise an inference of guilt independently of the accomplice testimony". We submit that this is the sensible meaning of the rule as to sufficiency of corroborative evidence. Tested by the rule in this sensible form, is it not manifest that the supposed "points of corroboration" mentioned by the Government in its Brief in Opposition herein do not satisfy, in a single instance, the test of sufficiency of "corroborative" evidence?

5. The Courts have declared many times that where several defendants are on trial, there must be corroboration as to each defendant to sustain a conviction on the testimony of accomplices. E.g., *People* v. *Mullens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944), motion denied 293 N. Y. 768; *Luna* v. *State*, 62 Okla. Cr. 435, 71 P. 2d 1101 (1937); *State* v. *Baish*, 32 Wyoming 136, 230 P. 678 (1924). Unauthorized acts of third parties may not be used as "corroboration" to connect a defendant with commission of the crime charged. *People* v. *Kress*, 284 N. Y. 452, 31 N.E. 2d 898 (1941). These principles are but an expression of the equally fundamental idea that "corroborated" "associative" imputations or emanations of alleged guilt through presence of the accused in the company of accomplices, or at the scene of the crime, etc., or other insinuations of "opportunity" to commit the crime, are insufficient. Thus:—Evidence which only shows opportunity to commit the offense is insufficient corroboration (*Roberd* v. *State*, 276 S. W.

2d 270 (Texas Cr. App.); *State* v. *Keckonen*, 107 Mont. 253, 84 P. 2d 341 (1938); *People* v. *Thurmond*, 338 P. 2d 472 (Cal. App. 1959); *State* v. *Brake*, 99 Ore. 310, 195 P. 583 (1921). And, more specifically, presence at or near the scene of the offense is insufficient. *Sheltman* v. *State*, 152 Tex. Cr. R. 139, 210 S. W. 2d 822; *People* v. *Wood*, 13 Cal. Rptr. 339 (Cal. App. 1961). Similarly, the mere existence of intimate personal relations between alleged co-conspirators is not sufficient to corroborate the evidence of an accomplice. *People* v. *Doyle*, 107 Misc. 268, 177 N. Y. S. 641 (N. Y. Gen. Sess. 1919). Mere acquaintance and relation of the defendant with a person who stole furs, both before and after the theft, was held insufficient to corroborate accomplice testimony and to connect the defendant with the offense. *State* v. *Paulen*, 210 Iowa 192, 230 N. W. 555 (1930). Corroborative testimony that defendant had left his residence on the night of the arsonous fire with the accomplices and had returned with them was held insufficient. Testimony that defendant was with the accomplice early in the evening on the night of a breaking and entering and that he slept that night at the home of the accomplice, whose conviction was sufficiently sustained by the evidence, was insufficient corroboration of the accomplice testimony. *Luster* v. *Commonwealth*, 333 S. W. 2d 267 (S. Ct. Ky., 1960). It was also held insufficient corroboration that the defendant was seen with accomplices before the commission of the offense and shortly thereafter in the vicinity to which the accomplices testified that the stolen property had been carried to be sold. *Smith* v. *State*, 140 Tex. Cr. R. 283, 144 S. W. 2d 542 (1940). In a bribery prosecution, evidence of the presence of the defendants with an accomplice near the place where on a certain date

the accomplice in private handed a sum of money to one of the defendants was insufficient corroboration of the accomplice's assertion that he transferred the money to one of the defendants. *People* v. *Mullens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944), motion denied 293 N. Y. 768, 57 N. E. 2d 845. In order for the intimate association of the accused with an accomplice to be corroborative of accomplice testimony it must be an association accompanied by circumstances which lead to an inference of connection with the crime itself, it being insufficient merely to show connection with the perpetrators of the crime. *State* v. *Reynolds*, 160 Ore. 445, 86 P. 2d 413 (1939). This conclusion was reached in the *Reynold's* case despite the fact also that it was proved that the accused had a memorandum containing the names of the accomplices, the Court stating that this was not a circumstance from which could be inferred association with the accomplices or connection with their crime so as to satisfy the test of corroboration. As it was well put in a New York case, the corroborative evidence must tend to connect the defendant with the crime, not with the accomplice. *People* v. *Lashkowitz*, 257 App. Div. 518, 13 N. Y. S. 2d 663, re-argument denied 258 App. Div. 828, 16 N. Y. S. 2d 525. We particularly call attention also to the decision of the Supreme Court of Minnesota in *State* v. *Starr*, 81 N. W. 2d 94 (1957), a burglary prosecution, where there was nothing except the accomplice testimony linking the accused to the crime, and the accused's explanation of his presence at a certain restaurant with a third party who admitted participation in the burglary with the accomplice was as consistent with the accused's innocence as with guilt, the Court holding that the evidence was insufficient to corroborate the testimony of the accom-

plice. We emphasize this and the similar foregoing cases because of the importance attached by both Courts below, and by the Government, to petitioner Kahaner's presence at certain meetings, as to which Kahaner offered innocent explanations. Additional cases illustrating the insufficiency of corroborative evidence based on the mere association of the accused with the perpetrators of the crime, or upon his presence at or proximity to the scene of the alleged offense, are, e.g., *Kemp* v. *State*, 24 Ala. App. 591, 139 So. 437 (1932); *Sanders* v. *State*, 46 Ga. App. 175, 167 S. E. 207 (1933); *Cornett* v. *State*, 42 Okla. Cr. 93, 274 P. 676 (1929); *O'Quinn* v. *State*, 43 Okla. Cr. 372, 279 P. 358 (1929); *Holmes* v. *State*, 52 Okla. Cr. 406, 5 P. 2d 770 (1932); *Odneal* v. *State*, 117 Tex. Cr. R. 97, 34 S. W. 2d 595 (1931) (a bribery prosecution in which defendant and the accomplice were together shortly before the alleged conspiracy to bribe the witness); *Livingston* v. *State*, 233 P. 235 (Okla. Cr. App. 1925); *Nunnally* v. *State*, 90 Tex. Cr. R. 233 (1921); *Johnson* v. *State*, 84 Tex. Cr. R. 400, 208 S. W. 170 (1919); *McClure* v. *State*, 89 Tex. Cr. R. 407, 231 S. W. 774 (1921); *Pate* v. *State*, 91 Tex. Cr. R. 471, 239 S. W. 967 (1922); *State* v. *Oster*, 376 P. 2d 83 (S. Ct. Ore. 1962); *People* v. *Kress*, 284 N. Y. 452, 31 N. E. 2d 898 (1941); *State* v. *Quinn*, 69 S. D. 574, 13 N. W. 2d 50 (1944); *People* v. *Braun*, 31 Cal. App. 2d 593, 88 P. 2d 728 (1939).

6. Several State Courts have laid down the requirement that the corroboration extend to one or even all of the actual elements of the offense charged—in our case the critical element being the alleged payment of money. Thus, the Kentucky Supreme Court has held that corroboration of the accomplice testimony, to warrant conviction, must extend to every fact necessary to establish that the offense charged

was perpetrated by the accused. *Means* v. *Commonwealth*, 238 Kentucky 266, 38 S. W. 2d 193 (1931); *Newby* v. *Commonwealth*, 255 Kentucky, 597, 75 S. W. 2d 25 (1934); *Spriggs* v. *Commonwealth*, 200 Kentucky 559, 255 S. W. 408 (1923). The California Court has ruled that the corroboration must relate to some act or fact which is an element of the crime. *People* v. *Lyons*, 324 P. 2d 556 (S. Ct. Cal. 1959); *People* v. *Means*, 3 Cal. Rptr. 597 (Cal. App. 1960). The Texas Court of Criminal Appeals has declared that where an accomplice's testimony is corroborated in only one essential fact, a conviction cannot be sustained since every essential fact testified to by the accomplice alone must be corroborated by non-accomplice testimony tending to connect the accused with the commission of the offense charged. *Almazan* v. *State*, 140 Tex. Cr. R. 432, 145 S. W. 2d 576 (1941). The Maryland, Iowa and Colorado rule is that the accomplice must be supported in at least some material point tending to show the guilt of the accused or the identity of accused with the perpetrators of the crime or with participation in its commission. *Lomp* v. *State*, 191 A. 2d 224 (S. Ct. Md. 1963); *State* v. *Geier*, 87 N. W. 2d 318 (S. Ct. Iowa 1958); *Miller* v. *People*, 92 Colo. 481, 22 P. 2d 626 (1933). Cognate with this is the fundamental rule earlier mentioned that what is needed in corroboratory testimony is that the defendant be connected with the commission of the offense charged, not merely that the offense was committed, nor of trivialities or immaterial matters. E.g., *State* v. *Pray*, 65 S. D. 1, 270 N. W. 542 (1937). As seen, there must be evidence from an independent source as to some material fact tending to show not only that the crime has been committed but that the defendant was implicated in its commission. *People* v. *Mullens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944), motion denied 293 N. Y. 768. Proof merely as

to the *corpus delicti*, i.e., commission of the offense or the circumstances thereof, is insufficient. *Mitchell* v. *State*, 28 Ala. App. 119, 180 So. 119 (1938), cert. denied 235 Ala. 530, 180 So. 123; *Newman* v. *State*, 63 Ga. App. 417, 11 S. E. 2d 248 (1940); *State* v. *Keckonen*, 107 Mont. 253, 84 P. 2d 341 (1938); *People* v. *Maione*, 284 N. Y. 423, 31 N. E. 2d 759 (1941), aff. 287 N. Y. 737, 39 N. E. 2d 940; *Hufford* v. *State*, 61 Okla. Cr. 141, 66 P. 2d 529 (1937); *Duarte* v. *State*, 48 Ariz. 356, 61 P. 2d 1015 (1936). Especially significant is the Texas case of *Reed* v. *State*, 118 Tex. Cr. R. 307, 40 S. W. 2d 97 (1931), holding that a conviction for possession of liquor could not be sustained unless the accomplice's testimony as to the *corpus delicti* was corroborated, and unless there was other testimony connecting the defendant with the commission of the offense. It is to be remembered that the *corpus delicti* in the instant case is the alleged payment of money to Kahaner and Keogh, and that there is no testimony whatever except from the accomplice witnesses to establish such alleged *corpus delicti*.

7. Applying the foregoing principles are the following illustrative cases which we have selected for a little more detailed description because their facts seem to us of special interest for our situation or for the evaluation of the Government's claimed "points of corroboration" herein:—In *People* v. *Sloan*, 17[illegible] al. 2d 778, 112 P. 2d 241 (1941), a prosecution of a mayor's secretary and another person for aiding, abetting and compelling the City's Civil Service Department manager and others to alter and falsify examination grade records, evidence offered to corroborate accomplices was held insufficient, among the insufficient items being: (1) The testimony of a non-accomplice retired fire department battalion chief as to his agreement with the

defendant's secretary to place men friendly to the Mayor's administration in the Fire Department's civil service positions; (2) testimony by a non-accomplice police officer that another person had told him that there was a preferred list of officers friendly to the Mayor's administration, that the defendant's secretary had agreed with said person's statement and had stated that friends of the administration would be taken care of, and that the person referred to had said he might be able to help the witness in the examination for position of sergeant; (3) testimony by another non-accomplice witness that he had received a list of numbers and police officers' names from one who had told the witness which numbers represented true or false answers to the examination questions, and that the witness gave the list to various police officers and received contributions for the Mayor's election campaign from some of them; (4) testimony by a non-accomplice acting police captain that the defendant's secretary had asked him how he would like to be a police captain, whether he favored the Mayor's administration, how he would like to be placed on the list of eligibles for captaincy; (5) testimony by a non-accomplice fire department employee that he had asked the defendant's secretary whether he could do anything to keep from being moved back on the list for battalion chief examination, that the defendant's secretary had said that the witness appeared to be one who would return a favor, and that the witness contributed to the Mayor's election campaign fund after publication of the eligible list with the witness in second place, and the witness was subsequently appointed to the position. In *Goodin* v. *Commonwealth*, 256 Kentucky 1, 75 S. W. 2d 567 (1934), an arson prosecution, none of the following evidence offered to corroborate the accomplice

testimony that the defendant had employed them to commit the crime was held sufficient: (1) That the defendant refused to swear out warrants against the confessed arsonists for taking the defendant's furniture from the house before burning it; (2) that he employed an attorney to attend their examining trial and procured a copy of the stenographer's notes at the Fire Marshal's investigation; (3) that the defendant had taken out substantial insurance on the burned house and the personalties therein; (4) that the defendant had allowed or required his tenant, who was behind in the rent, to move from the house two or three weeks before it was burned; (5) that the former tenant testified that one of the two confessed arsonists had asked her for rent, in which she was behind, when she moved out of the house that was subsequently burned; (6) that a mortgage had been signed by one of the confessed arsonists and witnessed by the defendant, the arsonist having testified that the defendant loaned her money for the first payment on the automobile used in hauling kerosene to the burned house; (7) that the defendant had given one of the confessed arsonists keys to the burned house and money for plaster to repair the breaks, the arsonists having testified that the defendant had employed them to burn the house and that the object of the repairs was to prevent suspicion during their arrangement to do so; (8) that the defendant had been heard to say that he did not enter the burned house after the fire because he was afraid that he might take hold of something which would show his fingerprints; (8) that one of the confessed arsonists was at the home in which the defendant roomed about noon on the morning after the fire. In *Wilson* v. *State*, 190 Ark. 651, 80 S. W. 2d 925 (1935), a prosecution for arson, evidence by the owner of a gin that the accused

had told him after the burning of the gin that he had brought the alleged accomplice out to the gin with prospective buyers to give his opinion on the gin machinery which the accused was selling for the owner's debt thereon, and evidence by the buyers that they barely knew the accomplice and did not want his opinion, was held insufficient corroboration of the accomplice testimony. Another illustration of the strictness with which the requirements as to corroborative evidence are applied is *People* v. *Dinenza*, 356 Ill. 118, 190 N. E. 298 (1934), a prosecution for attempted extortion, where the Supreme Court of Illinois held insufficient evidence that the defendant had written two or three letters at the alleged accomplice's home (the letters not being shown to have been the threatening letters allegedly delivered by the accomplice), notwithstanding further evidence that, when writing the letters, the defendant had asked the corroborating witness whether the intended victim had any money. Another instance of the strict application of the rule requiring corroboration is *State* v. *Sanderfur*, 82 N. W. 2d 623 (S. Ct. Minn. 1957), a burglary prosecution, where evidence that the defendant had, after his arrest, given a cell-mate a copy of a statement which defendant had given to the police and that defendant had directed the cell-mate to give a copy to the alleged accomplice with directions to "read it and stick to it", plus evidence that pliers which had disappeared from the burglary premises were subsequently found in an automobile driven by defendant, was held insufficient corroboration of the accomplice testimony. Another illustration is *People* v. *D'Allesandro*, 329 P. 2d 616 (Cal. App. 1959) holding that in a prosecution to defraud an insuror in regard to the destruction of a truck and conspiracy to do so, testimony of

the wife of an admitted accomplice to the effect that the defendant in two telephone calls had asked her whether the accomplice had talked, and that defendant had stated to her that the accomplice should not involve others, was insufficient corroboration. An interesting recent instance of the strictness of the rule requiring corroboration of accomplice testimony is *Froman* v. *State*, 339 S. W. 2d 601 (S. Ct. Ark. 1961), a prosecution for robbery, where the testimony of the victim's wife concerning the denomination of money taken in a robbery coincided with the testimony of the accomplice as to the denomination of money allegedly divided by the defendants in the accomplice's apartment after the robbery, and this was held insufficient as corroboration. We also call particular attention to the New York case of *People* v. *Lashkowitz*, 257 App. Div. 518, 13 N. Y. S. 2d 663 (1939), re-argument denied 258 App. Div. 828, 16 N. Y. S. 2d 525, a trial for arson, where the following was held insufficient corroboration: (1) Testimony that a non-accomplice witness saw the defendant give a key to the accomplice and that said accomplice told the witness that the key used in trying to open the door of the burned building was one received from defendant while they were returning home on the morning after the fire; (2) testimony of the accomplice's chauffeur that his employer requested payment of a stated sum by the defendant and that the defendant answered that the accomplice had made enough money during the alcohol period and would not be given any by the defendant. In a prosecution of a member of a County Board of Supervisors for obtaining money from the County by aiding and abetting the accomplice to obtain warrants by false pretenses, the fact that the defendant recommended payment of the claims was not sufficient corroboration of

the accomplice's testimony, nor was testimony that the accomplice had bought an automobile for the defendant. *State* v. *Hild*, 39 N. W. 2d 139 (S. Ct. Iowa). In a prosecution of a former commissioner of highways for falsely auditing or paying claims, the fact that the contracting company had a large portion of emergency contracts which had been let without advertisement for competitive bids, and that the company was apparently a favorite contractor, on friendly terms and a frequent caller at the highway department, did not corroborate the accomplice testimony. *State* v. *Ellsbera*, 209 Minn. 167, 295 N. W. 913 (1941). In *State* v. *Odle*, 45 S. D. 575, 189 N. W. 515 (1922), it was held that the fact that a person charged with conspiring to steal horses was with the thieves at the owner's place where he saw the horses and expressed the belief that they could be easily stolen, was a circumstance tending to connect him with the larceny if unexplained, but was insufficient to corroborate the accomplice testimony as to his having told them to take the horses where it was shown that he was at the place in another person's employment and was performing the duty for which he was employed at the time, so that such circumstance was as consistent with innocence as with guilt.

It has been frequently stated that, in the last analysis, the sufficiency of corroboration must be determined by the facts in each case. *Willman* v. *State*, 99 Tex. Cr. R. 259, 268 S. W. 933 (1925), second re-hearing denied 99 Tex. Cr. R. 259, 269 S. W. 801; *State* v. *Brake*, 99 Ore. 310, 195 P. 583 (1921); *Powell* v. *State*, 177 Ark. 938, 9 S. W. 2d 583 (1928); *State* v. *Cotton*, 240 Iowa 609, 33 N. W. 2d 880; *Bird* v. *State*, 85 Okla. Crim. 313, 188 P. 2d 242. And it has

been specifically held that in a conspiracy prosecution, proof of the existence of the underlying agreement and the connection of the defendant therewith may be of such a single and inseparable nature as to require corroboration of both of these elements, *People* v. *Griffin*, 219 P. 2d 519 (Cal. App.). In any event, our case, if the corroboration rule should be applied, would require corroboration of the alleged passing of money. Nothing in the Government's "points of corroboration" would meet the tests laid down in the cases above reviewed.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM W. KLEINMAN and
EUGENE GOLD,
Attorneys for Petitioner,
Elliott Kahaner.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 304

ELLIOTT KAHANER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING OF DENIAL OF CERTIORARI

WILLIAM W. KLEINMAN and
EUGENE GOLD,
Attorneys for Petitioner,
66 Court Street,
Brooklyn 1, New York

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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In The

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No. 304

Elliott Kahaner,

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PETITION FOR REHEARING OF DENIAL OF CERTIORARI

Petitioner, Elliott Kahaner, respectfully invoking the provision of Rule 58(2) of this Court which refers to petitions for rehearing filed on grounds of "intervening circumstances of substantial or controlling effect", prays for a rehearing by this Court to reconsider its order of October 14, 1963 which denied the petition for a writ of certiorari in this case.

The intervening circumstance above referred to is this Court's order of October 21, 1963, granting a writ of certiorari in *Evola* v. *United States*, and companion cases (Nos. 194, 195, 196, 197, 79 Misc., 80 Misc., 115 Misc., 149 Misc., 224 Misc.).

In the aforementioned *Evola* and companion cases—familiarly known as the "Genovese" case and hereinafter referred to as such—this Court's aforesaid order of Octo-

ber 21, 1963, in addition to granting the writs of certiorari, vacated the judgment of the Court of Appeals for the Second Circuit and remanded the cases to that Court "for reconsideration in light of *Campbell* v. *United States*, 373 U.S. 487, and for such further consideration as may be appropriate". From this broad wording of the Court's order in *Genovese*, and from the remark of the Justices who concurred in part and dissented in part—to the effect that "all the evidence before the District Court was documentary and the Court of Appeals was therefore correct in making factual determinations on the basis of such evidence"—we take it that the grounds for the granting of certiorari in *Genovese* may have included both the possible error of District Judge Murphy (error which was not reached for review by the Court of Appeals) in determining that non-production of the Shaw interview notes was non-prejudicial in point of the contents of those notes, and the possible error of the Court of Appeals in resolving the issues of the appeal in regard to the Shaw materials by arriving at a *de novo* finding of its own that the Shaw materials were actually not producible at all under the Jencks Act.

As we read *Campbell II* (373 U.S. 487), this Court there showed its continuing readiness both to review lower court determinations of the prejudiciality or non-prejudiciality of producible Jencks Act materials, and to uphold the primacy of the District Court's (*vis a vis* the Court of Appeals') authority to determine questions of prejudiciality and producibility under the Jencks Act.

Question no. 4 in petitioner Kahaner's petition for certiorari in this Court was: "Is the judgment of conviction fatally defective by reason of the denial to the defendant-

petitioner of Jencks Act statements to which he was entitled?"

Petitioner Kahaner's Statement of the Case in his petition for certiorari herein stated as follows concerning the Jencks Act issue (pp. 19-20):

> "Rose Kippe, Kahaner's secretary, testified for the Government in its direct case concerning Kahaner's telephone message book, Government Exhibit 80, and her and Kahaner's practice with respect to the book (243a-246a). Kippe then testified for the defense, and during her cross-examination by the Government she was questioned concerning a prior interview by the FBI (312a) (Government's Exhibit 91 marked for identification). Kippe's statement to the FBI was not given to the defense on either occasion of her testimony, although a demand was made by the defense for her prior statements (312a-313a). Furthermore, the trial court apparently even failed to examine Kippe's statements before ruling (Tr. 2869-2872; 313a). At the outset of the trial it was agreed among all counsel that all '3500' material would be given to the defendants without the need for a formal request. Such practice was followed throughout the trial.
>
> The defense also was not supplied by the Government with a statement of Dr. Fred Miller, an FBI document expert who testified on rebuttal as to certain obliterations in Kahaner's diary (241a-243a). The Government advised the Court of Appeals that it had a report by Dr. Miller made to the FBI (Appendix hereto, *infra*, p. 26a).
>
> The Court below held that nonproduction of these Jencks Act statements was 'harmless error' because the Kippe statement, which the Court said it had examined, 'is in full accord with the very limited testimony given by Mrs. Kippe as a witness for the Govern-

> ment, which was not disputed by anyone'; and because the Miller statement, which the Court below likewise, said it read, was 'simply a summary of the findings to which Mr. Miller testified' (*ibid*)."

Among the "Reasons For Granting The Writ" in Kahaner's petition for certiorari herein was the following (pp. 37-38):

> "4. Certiorari is appropriate in this case on the ground, without more, of the denial to petitioner Kahaner of the Jencks Act statements referred to at pp. 19-20, *supra*. At this comparatively late date in the administration of the Jencks Act it is hardly necessary to cite authority for the proposition that the defendant's right to statements under 18 U.S.C. § 3500 does not depend upon whether a trial Judge believes such statements can be utilized effectively by the defendant. *Clancy* v. *United States*, 365 U. S. 312; *United States* v. *Prince*, 264 F. 2d 850 (C.A. 3 1959); *Bergman* v. *United States*, 253 F. 2d 933, 935 (C.A. 6 1958). Circuit Judge Charles E. Clark, concurring in *United States* v. *Cardillo*, 316 F. 2d pp. 606, 616–617 (C.A. 2 1963), spoke words which have a remarkable aptness for the instant situation and which contain a remarkable summons for this Court to intercede in a certain class of Jencks Act cases of which the instant case, we submit, is an example."

The order, of October 21, 1963 in *Genovese* prompts us to present in a more complete way our own Jencks Act issue for the Court's consideration. The procedural setting of the Jencks Act rulings in our case is most unusual, and is deserving, we believe, of the Court's attention:

The Kippe statement was not even examined by the Trial Court before it ruled that the Government need not furnish that statement to the defense. In itself, this action (or, non-

action) by the Trial Court seems absolutely irreconcilable with the central purpose and philosophy of the Jencks Act as this Court has consistently administered that statute, for what is happening when a Trial Court refuses to order the Government to show the defense a "3500" statement without that Court itself even examining the statement is that the Court is thereby abdicating to the prosecution the duty and power of administering the Jencks Act at the trial level.

As regards the "3500" statement of the FBI documents expert, Miller, the procedural situation is even more striking than in the case of the Kippe statement. Despite the above noted understanding among trial counsel that "3500" materials would be supplied to the defense without specific request therefor, the Government never disclosed the existence of, and it never produced, the Miller "3500" statement until the case was in the Court of Appeals—where, as above noted, the Miller statement was still not shown to the defense (nor has it been to this moment) but was produced only for examination by the Court of Appeals, which examined it and held its non-production to have been "harmless error" (*supra*).

Before we speak of the question of the potential importance of these two Jencks Act statements in the present case from the standpoint of their possible substantive impact upon the trial, let us note in a little more detail the features of procedural short-shrift which are present here:

As to one "3500" statement (Kippe) the Government refused to produce it and the Trial Court acquiesced in this refusal without even examining the statement; then the Court of Appeals examined the statement, for the first time, and ruled *ex parte* that the statement would not have helped

the defense or, seemingly, that even if it would have helped the defense its non-production was "harmless error".

As to the second "3500" statement (Miller), the Government said nothing about its existence during the trial (despite the agreement to produce all "3500" materials without specific request), and the Government also said nothing about its existence after the trial and even during the appeal *until after the defense in its Reply Brief in the Court of Appeals further pressed the issue.* In Kahaner's opening brief in the Court of Appeals (pp. 42-43) he had argued that Miller was an agent of the FBI, "that the Government had in its possession a prior statement of each witness who testified", that accordingly "it may be inferred that the Government had taken prior statements or reports from * * * agent Miller", and that "the Government should state now whether such is the fact and if so the failure to furnish such statements to defendants was error requiring reversal of this conviction". The Government's brief in the Court of Appeals (p. 102), replying to this, stated—in what was ultimately to prove to have been loose language—that "There were no statements or reports of interview of [FBI Agent Miller] in the possession of the Government, consequently none was produced for the use of the defendants". Then, in Kahaner's Reply Brief in the Court of Appeals, he pressed the question as follows (p. 7):

> "In response to our request to know whether Dr. Miller rendered a report of his findings, the Government answers that it has none in its possession. Unanswered is whether such a report or notes of his conclusions was made by Dr. Miller, who is an employee of the Federal Bureau of Investigation, as distinguished from the Government's continued possession of such report or notes."

It was only after Kahaner had thus continued to press the question that the Government finally advised the Court of Appeals that there was indeed a statement by FBI Agent Miller (which the Court of Appeals, as noted, took it upon itself to examine *ex parte*, concluding that its prior non-production had been "harmless error" (Pet. Cert. 26a-27a)).

In *Campbell II* this Court emphasized that the Trial Court is best qualified to perform the initial screening functions with regard to Jencks Act materials. It is true that the Court in *Campbell II* was speaking primarily of the question of producibility rather than of prejudiciality in the portion of its opinion in that case where it was emphasizing the special hierarchical role of the Trial Judge in administering the Jencks Act. But this Court also, it seems, favors a like function of decisional primacy at the trial court level in regard to the vexing problem of Jencks Act "harmless error". In deciding *Campbell II* itself, as well as (apparently) in granting certiorari in *Gendicese*, this Court showed its continuing concern about cases where the Jencks Act is seemingly being circumvented by rulings of "harmless error" to dispose of defendants' claims of prejudice in the withholding of producible "3500" materials. Also, again, there is in our case the added aggrieving circumstance that the Trial Court never even performed its *in camera* function at all, because it did not look at the Kippe statement and it was deprived by the Government of any opportunity to look at the Miller statement.

Indeed, if our case presented nothing in regard to the Jencks Act issues, except the facts of the Government's own conduct in withholding from the defense these "3500"

items which it had promised to produce—especially questionable being the Government's tactics in regard to the statement of its own investigative employee FBI Agent Miller—the case would be deserving of this Court's corrective intercession.

The subject matter of this case is of unusual public importance, indeed of historic importance (see our petition for certiorari at pp. 28-31, and the Government's Brief in Opposition at p. 21). The desirability of certiorari is enhanced because of the indicatedly serious likelihood that the trial of this important case was unjustly affected by the cavalier and lip-service ways in which the commands of the Jencks Act have been "administered" in this record. This brings us to the question of just how substantially the fairness of the trial may have been affected by the failure to produce the "3500" statements of Kippe and of FBI Agent Miller:

In speaking to this facet of the Jencks Act issues herein we are handicapped, of course, by the inconvenience (to put it mildly) arising from the Government's (and both lower Courts') not having vouchsafed to us the right of knowing what those statements contain. Nevertheless, it is open to us to point out where the Kippe and Miller testimony fits in the perspective of the trial record as a whole, and how the Kahaner defense *may* have been affected by the withholding of these "3500" materials. It will be recalled that the conviction of Kahaner depended indispensably upon accomplice testimony (see our Reply Brief in the instant certiorari proceeding, pp. 1-7). The Government's Brief In Opposition urged that "there are many points of corroboration" (p. 20), citing, *inter alia*, the "telephone logs" and "the testimony of secretaries". In

our aforementioned Reply Brief we discussed these two latter "points of corroboration" in considerable detail (pp. 4-5); the Court will see from reading this last cited portion of our Reply Brief that these matters concern, *inter alia*, the testimony of Kippe (one of the secretaries) and Kahaner's telephone message book and diary. This last (the diary—Ex. "T"), in turn leads directly into the subject matter of the trial testimony of FBI Agent Miller who testified to certain "doodled" obliterations in Kahaner's diary in regard to messages received from Erdman and Keogh during times pertinent to the factual issues of the trial (Govt's Appendix 234-241). It was the defense position that all such "doodled" obliterations were perfectly innocent and were without significance. Not knowing what was in FBI Agent Miller's "3500" statement, we are unable even to guess how we might have utilized that statement for effective cross-examination on this aspect of the Government's "corroboration" proofs to which the Solicitor General has himself attached so much importance in his Brief In Opposition. Likewise in regard to the Kippe "3500" statement, we are unable to guess how we might have benefited from this on cross examination, but, again, the portion of Kippe's testimony to which the "3500" statement pertains is evidently regarded by the Solicitor General as one of the Government's important "points of corroboration".

We respectfully and especially invite the Court's renewed attention to our Reply Brief in the instant certiorari proceedings. We are mentioning this because our ground for this petition for rehearing—improper denial of Jencks Act statements as a ground given new emphasis by the *Gonzales* certiorari—coalesces with the argument in our aforesaid Reply Brief which dealt with the overall question of the

alleged corroboration of the accomplice testimony in this trial.

In conclusion, we respectfully call the Court's attention to the language of the Court of Appeals of the State of New York (opinion by Fuld, J.) in the well-known case in which that Court enunciated the equivalent of the Jencks rule for New York State criminal proceedings (*People* v. *Rosario*, 9 N.Y. 2d 286, 290, 213 N.Y.S. 2d 448, 451):

> "Furthermore, omissions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes. Until his attorney has an opportunity to see the statement, it is asked, how can he effectively answer the trial judge's assertion that it contains nothing at variance with the testimony given or, at least, useful to him in his attempt to discredit such witness?
>
> "It is true that defense counsel will undoubtedly be in a position to cross examine at greater length than without such pretrial statements. But there is nothing wrong in this. . . ."*

* It is true that the Court went on, in the *Rosario* case, *supra*, to hold that non-production of the materials which were held producible had not prejudiced the defendant because "On the record before us, there can be no possible question of the appellant's guilt, even apart from the testimony of the witnesses whose statements had been requested and refused. Not only was there evidence of admission to friends before and after the fatal robbery, not only was there proof of a confession to the district attorney, not only was there evidence of flight, but there was ballistics testimony indicating that the lethal bullet had issued from the appellant's gun. And, of the utmost significance, examination of the prior statements discloses that the few variances contained in them were of a most inconsequential character." The question of petitioner Kahaner's guilt depended dispositively on the testimony of accomplice witnesses of the basest credibility.

CONCLUSION

It is respectfully submitted that this petition for rehearing should be granted, and that the petition for certiorari should be granted.

Respectfully submitted,

WILLIAM W. KLEINMAN and
EUGENE GOLD
Attorneys for Petitioner
Elliott Kahaner

[Certificate of counsel follows]

Certificate of Counsel

I hereby respectfully certify that the foregoing petition for rehearing on behalf of petitioner Elliott Kahaner is presented in good faith and not for delay. In this connection I may state that, as of the time of the filing of this petition for rehearing, it is not contemplated that any application will be made for a stay of the surrender of petitioner Elliott Kahaner to commence the service of his sentence, said surrender being presently scheduled for November 7, 1963. I further certify that the within petition for rehearing is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

EUGENE GOLD
Attorney for Petitioner
Elliott Kahaner